Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1996

LARRY A. CROSSLEY

*Petitioner,*

vs.

LIBERTY BANK & TRUST CO., THOMAS J. HROMATKA, C.E.O., HERTZ FARM MANAGEMENT INC., GARY LOOS AS RECEIVER, FARMERS CO-OP ASSOCIATION FOREST CITY, FARMERS CO-OP ELEVATOR CO. LELAND, DON SEVERSON, GARY STERLING, RONALD G. PYLE, RONALD PENNING, AND YET TO BE NAMED JOHN DOES,

*Respondents.*

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

# PETITION FOR WRIT OF CERTIORARI

**LARRY A. CROSSLEY**
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42 pp

## QUESTIONS PRESENTED

1. Certiorari should be granted to supervise the departure from the accepted and usual course of judicial proceedings.

2. Certiorari should be granted to resolve the conflict among the Eighth Circuit and the State Court relative to the application of Title 42 U.S.C. §1983, 1985(3), 1986, Title 7 U.S.C. §2000 et. seq. and Iowa Code 561, 656, 554, 646, 680, I.R.C.P. 258.

## PARTIES TO THE PROCEEDING

Petitioner, Larry Crossley, is a resident of Todd County, Minnesota. Crossley was the plaintiff in the United States District Court for the Eighth Circuit proceedings of this case and was the Apellant before the United States Court of Appeals for the Eighth Circuit.

Respondents Liberty Bank & Trust Co. and Thomas J. Hromatka C.E.O., the bank is a corporate owned bank existing by virtue of the laws of the State of Iowa. Respondent Liberty Bank does business in Winnebago County, Iowa and was a defendant to the action in the lower court proceedings. Thomas J. Hromatka was the acting C.E.O. and a resident in Winnebago County and also a defendant in the lower court proceedings. Liberty Bank & Trust Co. and Hromatka were also an Appellee before the United States Court of Appeals for the Eighth Circuit.

Respondents Hertz Farm Management Inc. and Gary Loos as receiver, existing by virtue of and acting under the laws of the State of Iowa whose office is in Cerro Gordo County, Iowa and does business in North Central Iowa including Winnebago County, Iowa, were defendants to the action in the lower court proceedings. Gary Loos was acting as receiver in the Iowa District Court proceedings. Hertz and Loos were also Appellees before the United States Court of Appeals for the Eighth Circuit.

Respondents, Farmers Co-op Assoc. Forest City, Farmers Co-op Elevator Co. Thompson, Farmers Co-op Elevator Co. Leland, the grain elevators are cooperatives organized and operating by virtue of the laws of the State of Iowa. Rake Cooperative Elevator of Rake Iowa own Thompson and Leland Cooperative Elevators. Respondents Don Severson, Gary Sterling, Ronald G. Pyle and Ronald Penning are or were acting as elevator managers or assistant managers for the defendant grain elevators and all are or were doing business in Winnebago County Iowa and were defendants to the lower court proceedings. The three grain elevators were cooperatives and managers or assistant managers were also Appellees before the United States Court of Appeals for the Eighth Circuit.

There are John Doe and Jane Doe defendants that were to be named prior to trial as discovery was completed.

There are no other parties to this action.

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## OPINIONS BELOW

On January 10, 1996, the United States Court of Appeals for the Eighth Circuit issued its opinion, affirming the decision of the District Court. That opinion was unpublished.

On July 1, 1996, the United States Court of Appeals denied the suggestion for rehearing en banc, and also petition for rehearing by the panel was also denied.

## STATEMENT OF JURISDICTION

Petitioner seeks review of the opinion of the United States Court of Appeals for the Eighth Circuit and its judgment of July 1, 1996. That judgment affirmed the lowe~ court's grant of summary disposition. Petitioner invokes the certiorari jurisdiction conferred on this Court by 28 U.S.C. §1254(1).

## STATUTE INVOLVED

42 U.S.C. §1983 provides:

§1983. Civil Action For Deprivation Of Rights.

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purpose of this section, any Act of Congress applicable exclusively to the District of Columbia shall

be considered to be a statute of the District of Columbia.

42 U.S.C. §1985(3) provides:

§1985(3). Conspiracy To Interfere With Civil Rights.

(3) If two or more persons in any State or Territory conspire to go in disguise on the highway or on the premises of another, for the purpose of depriving either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the law; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws; or if two or more persons conspire to prevent by force, intimidation, or threat, any citizen who is lawfully entitled to vote, from giving his support or advocacy in a legal manner, toward or in favor of the election of any lawfully qualified person as an elector for President or Vice

President or as a Member of Congress of the United States; or to injure any citizen in person or property on account of such support or advocacy; in any case

of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a citizen of the United States, the party so injured or deprived may have an action for the recovery of damages occasioned by such injury or deprivation, against any one or more of the conspirators.

42 §1986 provides:

§1986. Action For Neglect To Prevent

Every person who, having knowledge that any of the wrongs conspired to be done, and mentioned in section 1985 of this title, are about to be committed, and having power to prevent or aid in preventing the commission of the same, neglects or refuses so to do, if such wrongful act be committed, shall be liable to the party injured, or his legal representatives, for all damages caused by such wrongful act, which such person by reasonable diligence could have prevented; and such damage may be recovered in an action on the case; and any number of persons guilty of such

wrongful neglect or refusal may be joined as defendants in the action; and if the death of any party be caused by any such wrongful act and neglect, the legal representatives of the deceased shall have such action therefor, and may recover not exceeding $5,000 damages therein, for the benefit of the widow of the deceased, if there be one, and if there be no widow, then for the benefit of the next of kin of the deceased. But no action under the provisions of this section shall be sustained which is not commenced within one year after the cause of action has accrued.

7 U.S.C. §2000

§2000. Homestead Protection.

(3) The term "homestead property" means the principal residence and adjoining property possessed and occupied by a borrower specified in paragraph (2) of this subsection, including reasonable number of farm out buildings located on the adjoining land that are useful to the occupants of the homestead, and no more than 10 acres of adjoining land that is used to maintain the family of the individual.et.seq.

Iowa Code §561.

§561. Homestead.

561.16 Exemption.
The homestead of every person is exempt from judicial sale where there is no special declaration of statute to the contrary. Persons who reside together as a single household unit are entitled to claim in the aggregate only one homestead to be exempt from judicial sale. A single person may claim only one homestead to be exempt from judicial sale. For the purposes of this section, *"household unit"* means all persons of whatever ages, whether or not related, who habitually reside together in the same household as a group.

561.21 Debts For Which Homestead Liable.
The homestead may be sold to satisfy debts for each of the following classes:
1. Those contracted prior to its acquisition, but then only to satisfy a deficiency remaining after exhausting the other property of the debtor, liable to execution.
2. Those created by written contract by persons having the power to convey, expressly stipulating that it shall be liable, but then only for a

deficiency remaining after exhausting all other property pledged by the same contract for the payment of debt.
3. Those incurred for work done or material furnished exclusively for the improvement of the homestead.
4. If there is no survivor or issue, for the payment of any debts to which it might at that time be subjected if it had never been held as a homestead.

Iowa Code §656

§656 Forfeiture Of Real Estate Contracts.

Iowa Code §554 Uniform Commercial Code.

§554.9307, §554.9313, §554.9315, Rights of Third Parties-Perfected and Unperfected Security Interests-Rules of Priority.

Iowa Code §646 Recovery of Real Property.

§646.23 Growing Crops-Bond. If the defendant avers that the defendant has a crop sowed, planted, or growing on the premises, the jury, finding for the plaintiff, and also finding that fact, shall further find the value of the premises from the

date of the trial until the first day of January next succeeding, and no execution for possession shall be issued until that time, et. seq.
§646.24 Writ of Possession.
When the plaintiff shows that the plaintiff is entitled to the immediate possession of the premises, judgment shall be entered and an execution issued accordingly.

Iowa Code §680 Receivers.

§680.1 Appointment.
On the petition of either party to a civil action or proceeding, wherein the party shows that the party has a probable right to, or interest in , any property which is the subject of the controversy, and that such property, or its rents or profits, are in danger of being lost or materially injured or impaired, and on such notice to the adverse party as the court shall prescribe, the court, if satisfied that the interests of one or both parties will be thereby promoted, and the substantial rights of neither unduly infringed, may appoint a receiver to take charge of and control such property under its direction during the pendency of the action, and may order and

> coerce the delivery of it to the receiver.

Iowa Rules of Civil Procedure rule 258.

> Rule 258. Execution; Duty of Officer.

**STATEMENT OF THE CASE**

This matter concerns a state foreclosure action of real estate purchased by Donald and Patricia Crossley on contract from James and Frances Ballard in 1973. In April of 1985 Donald and Patricia Crossley gave Forest City Bank and Trust co. an assignment for security purposes of their vendee's interest in the property. Forest City Bank and Trust and Donald and Patricia Crossley let their Vendee's interest go into default on April 1, 1986. With the real estate contract in default Frances Ballard vendor in Oct. of 1986 sold certain of and assigned all of her interest in the property as vendor to Larry Crossley.

On October 20, 1988, Liberty Bank and Trust filed a petition to foreclosure their vendee's interest in the real estate contract in the Iowa District Court which named Donald and Patricia Crossley and Larry Crossley and France Ballard as defendants' in Case No. 13978.

Defendants, Donald and Patricia Crossley asserted counter claims against the Bank for fraudulent misrepresentation and breach of contract. These defendants also asserted a counter claim for breach of an implied duty of good faith and fair

dealing arising out of a bank/customer relationship. The counter claims were tried to a jury which found against the Donald and Patricia Crossley. As a result of the jury's verdict, the counter claims were dismissed by order of Judge Jon Stuart Scoles in the foreclosure action filed on October 24, 1990.

On October 24, 1990, the Court entered its FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER, the court entered judgment in favor of Liberty Bank and against Donald and Patricia Crossley in the amount of 332,324.78, plus interest. In addition, the order provided that counsel for the Liberty Bank should prepare a DECREE OF FORECLOSURE to be entered by the court.

On May 13, 1991, the court filed its DECREE IN FORECLOSURE, and provided for foreclosure of the equitable mortgage. Liberty Bank set redemption at six(6) months and WAIVED ANY RIGHT TO A DEFICIENCY AGAINST THE DEFENDANT'S IN CASE NO. 13978.

The Winnebago County Court in their decree in foreclosure never obtained a judgment against defendants Larry Crossley or France Ballard.

In its order of the Winnebago County Court Decree dated May 13, 1991 the Iowa District Court at p.2 stated:

> 2. The plaintiff's equitable mortgage is established as a lien against the real estate above described and is superior and paramount to the interest, liens and claims of the defendants, except to the extent of the

> vendor's interest in the real estate contract executed on March 23, 1973. The court need not decide in this proceeding whether Frances Ballard or Larry Crossley has legal or equitable title to the property, because that is not in issue in this foreclosure action. The vendor's interest in the property, whomever may later be determined to hold it, is superior to the interest foreclosed upon by the plaintiff.
> On July 12, 1991, Appellant-Crossley filed his declaration of Homestead with the Winnebago County recorder, homestead book, page 98-9.

On July 17, 1991, the property was sold at sheriff's sale to Liberty Bank, for the sum 405,271.43, representing the entire judgment, interest, attorney feeds, and cost amount to obtain the farmland.

On January 21, 1992, following the expiration of a six month period of redemption, Appellee Bank traded in their writ of possession to get sheriff's deed that was issued in favor of Liberty Bank, the decree stated,

> "On expiration of the period of redemption for the mortgaged real estate, if possession be not immediately then surrender (sic) to the grantee of the sheriff's deed to be issued under said execution, a writ of possession shall be issued directing the sheriff of this county to put such

grantee in possession of mortgaged premises."

On March 25, 1992, Liberty Bank and Hertz Farm Management Inc., filed and served the defendants with a petition in small claims court on a action for Forcible Entry and Detainer, Case No. 8-4997-0392.

On April 16, 1992, small claims court came on for hearing in magistrate court, defendants argued that the magistrate court did not have jurisdiction. Magistrate ruled against the defendants and order a writ of possession to be used against the defendants immediately, and directed that the defendants Larry, Donald and Patricia Crossley be removed from the premises and that Liberty Bank and Hertz Farm Management Inc. be put in possession thereof.

On April 20, 1992, defendants posted bond and filed appeal to the Winnebago District Court, hearing was held in May of 1992, on the defendants' appeal.

On June 16, 1992, Judge Stephen Carroll entered the courts ruling and filed same on June 17, 1992, court stated on page 8, of ruling, "The court therefore concludes that the magistrate did not have jurisdiction to hear this case, the district court does." "Accordingly, the magistrate's court ruling should be reversed and the case dismissed. Court goes on to state, "IT IS THEREFORE ORDERED that plaintiff's action for FORCIBLE ENTRY AND DETAINER brought in the Iowa District Court Small Claims Division, is DISMISSED."

On June 29, 1992, the Appellee Liberty Bank filed a praecipe for writ of possession, directing the clerk of court to issue a writ of possession in compliance with the decree in foreclosure dated May 13, 1991, five months after they had received a sheriff's deed.

On July 31, 1992, the sheriff of Winnebago County removed defendants from their homestead, and without a judgment against Appellant-Crossley and with Appellee Liberty Bank waiving their judgment against the homestead.

On June 2, 1993, Appellees Liberty Bank filed and recorded an amended sheriff's deed with the Winnebago County recorder book 281, page 127, and later on June 17, 1993, Appellee Liberty Bank filed the amended sheriff's deed with the Winnebago County Clerk of Court.

On July 23, 1991, Appellant-Crossley filed his Federal Complaint where it showed that the defendants' had violated his constitutional rights, violations of 42 U.S.C. sections 1983, 1985, 1986, and RICO. On April 6, 1992, Judge Donald E. O'Brien, Chief Judge of the United States District Court dismissed Appellant-Crossley's Complaint that stated, "IT IS FURTHER ORDERED that if plaintiff fails in his attempt to have the Iowa District Court's Order of November, 1990, overturned, he may refile, without payment of any additional fees, any new and different claims than those previously asserted. "This was Case No.C91-3050.

On December 22, 1993, the clerk of the United States District Court for the Northern District of Iowa Central Division

gave Appellant-Crossley a new Case No. 93-3083.

On June 13, 1994, Appellant-Crossley filed his Civil Complaint with Case No. C93-3083 with violations "liberty" and "property" rights, "civil rights", violations by the defendant-appellees' of the 1st, 4th, 5th, 7th, and 14th Amendments of the United States Constitution; violations of Title 42 §1983, 1985(3), 1986 and Iowa Code Statutes 561, 561.21, 561.4, 654, 680, 554, 561.16, 646, I.R.C.P., Rule 258.

On October 27, 1994, Judge Mark W. Bennett, U.S. District Court Judge filed his order pursuant to Case No. C93-3083, regarding defendants' Motions to Dismiss Appellant-Crossley's Complaint and did error in it's order that states,

> "In the prior state court proceedings, and in Crossley I, Crossley raised challenges to the propriety of the foreclosure proceedings, the sheriff's sale, the sale of the crops from the 1992 season, and the notice of first refusal. This series of legal actions, which all concerned the events surrounding the foreclosure of the real estate in question, are the same actions which Crossley challenges in this case. The court has little difficulty concluding that the claims asserted by Crossley involve "the same nucleus of operative fact" previously litigated in Crossley I and the Iowa State Courts. Therefore, the

> court finds that Crossley's claims against Defendant Liberty Bank & Trust are barred by operation of res judicata, and the court shall grant Defendant Liberty Bank & Trust's motion for summary judgment."

On November 4, 1994, Appellant-Crossley filed his motion to court pursuant to F.R.C.P., Rules 52(b) and Rule 59 with motion, brief and affidavit in support of, Appellant-Crossley asserted that the court made factual and legal errors in its order of October 27, 1994, in granting defendants' motions to dismiss.

On January 5, 1995, Mark W. Bennett, United States District Judge denied Appellant-Crossley's motion pursuant to F.R.C.P., Rules 52(b) and Rule 59.

On February 6, 1995, Appellant-Crossley appealed Judge Mark W. Bennett order's to the United States Court of Appeals for the Eighth Circuit, the court did error in not fully complying with Rule 56's notice requirements.

The case was submitted December 29, 1995 to the United States Court of Appeals for the Eighth Circuit. The Court of Appeals affirmed the holding of the lower court on January 10, 1996.

Petitioner now seeks the review of this Court.

## REASONS FOR GRANTING THE WRIT

## I.

## CERTIORARI SHOULD BE GRANTED TO SUPERVISE THE DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

Apellant-Crossley alleged violations of his Liberty and property rights in his complaint against the named defendant-appellees. Appellant-Crossley alleged deprivation of his homestead by named defendants and deprivation of his 1992 crops by the named Appellees. The Appellees filed Rule 12(b)(6) motions to dismiss and did not file any type of answer to Appellant-Crossley's Complaint. No Rule 56 motions for summary judgment were filed by Appellee's. The Supreme Court Justice, Rehnquist, held in CELOTEX CORP. V. CATRETT 106 S. Ct. 2548 (1986), that: (1) Rule 56(c) mandates the entry of summary judgment after adequate time for discovery against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case as to which that party will bear the burden of proof at trial; (2) there is no requirement that moving party support its motion with affidavits or other similar materials negating the opponent's claim; and (3) nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Appellant-

Crossley asked the court for time to do discovery and Appellant-Crossley was denied by the Court. Crossley was denied adequate time to do discovery.
Rule 56 must be construed with due regard not only for the rights of persons asserting claims and defenses that are adequately based in fact to have those claims and defenses tried to a jury but also for the rights of persons opposing such claims and defenses to demonstrate, in the manner provided by the rule prior to trial, that the claims and defenses have no factual basis. Fed. Rules Civ. Proc. Rule 56, 28 U.S.C.A. Federal Civil Procedure 2461.

Party seeking summary judgment always bears the initial responsibility of informing the district court of the basis for its motion and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, which it believes demonstrate the absence of a genuine issue of material fact. Fed. Rules Civ. Proc. Rule 56(c), 28 U.S.C.A.

The trial court did error in turning appellee's motion to dismiss into motion for summary judgment without notice to Appellant-Crossley, when no depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. There are numerous genuine issues of material facts that were ignored by the District Court. For example, there was no judgment against

Crossley, Crossley was removed from his homestead, Crossley was deprived of his crops, Appellees only filed motions to dismiss, Howard L. Draper did not timely file Hertz Farm Management Inc.'s motion to dismiss, Appellees elevators violated and ignored the Iowa Code Statutes 554, et. seq. U.C.C., Liberty Bank's first Sheriff's Deed was void, Liberty Bank used their writ of possession prior to the removal of Crossley, Larry Crossley still has paramount title to subject property, Liberty Bank has not tendered the full amount owing on the March 23, 1973 real estate contract, and the named Appellees did conspire to deprive Larry Crossley of his Constitutional Rights. Appellees defendants did not show that they were entitled to a judgment as a matter of law. Summary judgment is proper only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." CELOTEX CORP. V. CATRETT, 477 U.S. 317, 322, 106 S. CT. 2548, 2552, 91 L. Ed. 2d 265 (1986); CONTINENTAL GRAIN CO V. FRANK SEITZINGER STORAGE, 837 F. 2d 836, 838 (Eighth Circuit 1988). A moving party is "entitled to judgment as a matter of law: if the nonmoving party fails to make a sufficient showing of an essential element of a claim with respect to which it has the burden of proof. Id. 477 U.S. at 323, 106 S. Ct. at 2552 JOHNSON V. SCHOPF, 669 F.

Supp. 291, 295 (D Minn. 1987). However, summary judgment should not be granted if a reasonable jury could return a verdict for the nonmoving party. ANDERSON V. LIBERTY LOBBY, INC., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986). The Appellee's filed Rule 12(b)(6) motions to dismiss and did not file any type of answer to Appellant-Crossley's Complaint. No Rule 56 Motions for summary judgment where filed by the Appellees gave no explanation for the taking of Appellant-Crossley's homestead and Appellant's 1992 crops. Appellant-Crossley explained to the court that there were no judgments in the State Court action against him, and also explained that the Appellee Bank had waived any right to a deficiency judgment and therefore according to IOWA CODE STATUTE 651.16, states, "The homestead of every person is exempt from judicial sale where there is no special declaration of statute to the contrary." GREEN V. FORNEY, 1907, 134 Iowa 316, 111 N.W. 976. To merely mark out, plat and record a tract of ground as a homestead, is not sufficient to make it such. Its occupancy and use, as a home, by the family, are the essential requirements. COLE V. GILL, 1863, 14 Iowa 527. In order to render premises occupied by a family exempt as a homestead, no plat need be filed. YOST V. DEVAULT, 1859, 9 Iowa 60. IOWA CODE STATUTE 561.4 Appellant filed the declaration of homestead with the Winnebago County, recorder in homestead book on page 98-9. Appellant-Crossley also filed with the Winnebago County

recorder an affidavit of right of possession on July 12, 1991, book 10, page 277-8. IOWA CODE STATUTE 561 AND 628 gives a person that is being foreclosed on certain rights. "Vendors, who were authorized to claim as much as 40 acres in homestead property...". BECKER V. GUSTAFSON, 279 N.W. 2d 744. Appellant was in possession of the homestead and resident of the household unit and Appellees Bank had waived deficiency judgment on subject property and therefore can not show that a receiver was needed or appropriate, BENNETT V. ELDON MILLER, INC., 106 N.W. 2d 257. Appellee Hertz Farm Management Inc., has caused damage to Appellant, Crossley was forced to pay rent to the receiver on land that they had no right to possession of, the receiver canceled Appellant-Crossley's insurance policy on the property. THE SUPREME COURT OF IOWA will allow the appointment of a receiver in the case of a deficiency. See COMMUNITY STATE BANK V. COTTINGTON, 444 N.W. 2d 487, and cases cited therein. However, the court may not appoint a receiver where a deficiency has been waived see FEDERAL LAND BANK V. FAUGHT BROS., 468 N.W. 2d 793, 795 (Iowa 1991). "Where the right to a deficiency has been waived there exists no right to appoint a receiver based on a claimed potential for deficiency." It is interesting to note that the same Iowa District Court Judge heard the Faught case as well as the Crossley case, in both cases the District Court Judge appointed the receiver when any right to a

deficiency judgment had been waived in both cases.

Appellant-Crossley alleged Constitutional Violations of "good faith" and "obligation of contract clause" guaranteed by the 1st and 14 Amendments of the U.S. Constitution in his Complaint, which happens to be Constitutional issues, as Appellant finds support in MORELLO VS. JAMES, 810 F. 2d 344 (1987) which states:

> "dismissal reversed as every citizen has right of access to the courts where oppression damages on constitutional grounds are alleged as allegations must be accepted as true."

Like the Old demurrer, a motion to dismiss admits the well pleaded facts in the complaint for the purpose of testing their legal sufficiency. GREENLAND V. FAIRTRON CORP. 500 N.W. 2d 36, 37 (Iowa 1993). The motion may not be supported by its own allegations of fact not contained in the complaint. Where upon full reading of Appellant's complaint it is clearly alleged of violations of these Amendments as well as others wherein acts, actions, conduct, and policies of the defendants' have inflicted severe irreparable damages upon Appellant and innocent third persons where the Federal Court did error in not meriting denial of Appellees' motions to dismiss.

Had the facts been viewed in a light most favorable to the Petitioner, the motion for summary judgment would have been denied. This is because the record did support issues for trial. Instead the

circuit court acted as a super jury and decided the facts against the Petitioner. This was reversible error.

Petitioner submits that certiorari should be granted because the Eighth Circuit's judgment departed from the accepted and usual role to be performed by a court on motions for summary judgment. This case should have proceeded to trial on the merits. This Honorable Court should reject the Court of Appeals' insistence on being a fact finder.

## II.

**CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE EIGHTH CIRCUIT AND THE STATE COURT RELATIVE TO THE APPLICATION OF TITLE 42 U.S.C. §1983, 1985(3), 1986, TITLE 7 U.S.C. §2000 ET. SEQ. AND IOWA CODE 561, 656, 554, 646, 680, I.R.C.P. 258.**

Appellent-Crossley dispossessed from his homestead, they had his crops harvested and hauled to three local Elevators which are all named defendants in his complaint, the named appellee-defendants and managers had actual knowledge of the "notice of security interest in farm products" that is filed with the secretary of State of Iowa. UCC filings which states "This notice is tendered pursuant to IOWA CODE STATUTE 554.9307, as amended, and Public Law 99-198, para. 1324." The respondent Elevators/Managers were in contact with

Liberty Bank & Trust Co. and ignored the UCCs and issued moneys to Liberty Bank for Crossley's grain, Crossley received no money, there actions are in direct conflict with Iowa Code §554. "Where private entity acts in concert with state actor, private entity is also subject to liability under this section." Title 42 U.S.C.A. Statute 1983" THREE RIVERS CABLEVISION, INC. V. CITY OF PITTSBURGH, D.C. Pa. 1980, 502 F. Supp. 1118. "To state a claim under 42 U.S.C. Section 1985(3) a complaint must allege four elements", GRIFFIN V. BRECKENRIDGE, 403 U.S. 88, 102-03 (1971), Appellant-Crossley did alleged all four elements in his complaint, and has alleged discriminatory motive on the part of the conspirators. MASSEY V. SMITH, 555 F. 2d 1355, 1356 (Eighth Circuit 1977). Appellant-Crossley's complaint did state a claim under title 42 U.S.C. section 1983, 1985 and 1986. "A cause of action under section 1986 is dependent on a valid claim under section 1985. SEBASTIAN V. UNITED STATE, 531 F. 2d 900,904 n.11 (Eighth Circuit 1976), cert. denied, 429 U.S. 856 (1976); KAYLOR V. FIELDS, 661 F. 2d 1177, 1184 (Eighth Circuit 1981).

Appellant filed new and different claims against different appellee's on June 13, 1994, with the court, the complaint alleged violations of due process of law, liberty and property rights which are Civil right, which appellees' defendant's violated Appellant's 1st, 4th, 5th, 7th, and 14th Amendments of the United States Constitution, violations of Iowa Code

Statutes 561, 561.21, 561.4, 654, 680, 554, 537, 561.16, 646, I.R.C.P., Rule 258, Title 28 U.S.C. 1331, 1332, and 1343, Title 42 U.S.C. §1983, 1985, and 1986. All violations took place after Judge O'Brien's order dated April 6, 1992, the District Court would not acknowledge this fact and the fact that the Respondents were not named Defendants in my first case in Federal District Court. The Winnebago District Court order dated October 13, 1993, on the 1992 crops was an erroneous decision of the court "an erroneous decision does not bind the parties in a subsequent action on a different cause of action" SWANK V. ST PAUL CITY RY. (1895) 61 Minn. 423 63 N.W. 1088: U.S. Moser (1924) 266 U.S. 236.

Appellant-Crossley filed his motion pursuant to Rule 59 with the hopes that the search for truth in the light of justice be accomplished pursuant to truth, justice and adjudication on full material facts without "conclusions" used which are untrue, unfounded and without statute or constitutional foundations where everyone should be aware of two (2) basic principles in jurisprudence with keeping in mind the warning expressed by Justice Brandeis in his dissenting opinion as found in OLMSTEAD VS. UNITED STATES, 48 S. CT. CT. 564 (1925) states,

> "If the government becomes a law-breaker, it breeds contempt for its laws."

Defendant's-Appellee's herein, one and all, have once again brought fraud upon this Court by the very findings of their pleadings as filed. These are

"conclusions" as dismissal of Appellant's complaint was entered without Appellant's issue's being heard so the court based its "conclusion" had to be based either on "political reason" or "moral personal reason", both which are not founded with either the "commands" of the Constitution of the State of Iowa which is found in a very recent decision by the United States Supreme Court, Justice Kennedy wrote so very clear of the mandates of all federal courts which were denied to Appellant. See UNITED STATES VS. GOOD REAL PROPERTY, 114 S CT. 492 (1994) where the following statement is made as

> "Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn."

Appellant-Crossley herein hopefully pray the facts will surface in the search for the truth, since Appellant's allegations must be accepted as true is supported against all Defendant-Appellees as seen in ANDERSON VS. BOYD, 714 F. Supp. 906 (1983) wherein is found the following:

> "Dismissal reversed as judges and court officials are not immuned from civil rights allegations and a motion to dismiss for failure to state a claim does not override civil

> rights allegations as complaint must be liberally construed as allegations must be accepted as true."

Appellant's allegations in complaint that has been buried without redress which are Constitutional rights of Appellant by the 7th Amendment of the U.S. Constitution and the Constitution of the State of Iowa. Appellant's issues is reversible error where as found in GENERAL MOTORS CORP. VS. BLEVINS, 571 F. Supp. 38 (1956) opinion reveals that,

> "Right and justice is right to contract protection of the 14th amendment as protection is a mandated constitutional right."

Appellant finds support in WILLIAMS VS. DRESSER INDUSTRIES INC., 795 F. Supp. 1144 (1992) states:

> "Concealment of material facts may amount to fraud... where the concealment is of intrinsic of the article which the other party by the exercise of ordinary prudence and caution could not discover (cit.); and misrepresentation may be perpetrated by acts as well as words and by artifices designed to mislead."

Discovery is a due process right wherein dismissal of Appellant-Crossley's complaint did deprived Crossley of "due process" in civil matter, CHAPMAN VS. CALIFORNIA, 87 S. CT. 824 (1967) that states:

"Constitutional rights requires due process.:

See also EX PARTE VIRGINIA, 100 U.S. 339 (1879) Wherein the entire opinion came down to the following:

"14th Amendment requires "due process" and "equal protection" of property rights.:"

"Due process" is a "peoples right" see HOLDEN vs. HARDY, 18 S. CT. 833 (1898) wherein as seen in HUGHES vs. ROWE, 101 S. CT. 6 (1980) holds:

"Action without full hearing is a "due process" violation and a civil rights violation as well."

The Federal Court's decision in this case has been in conflict with all of the cases cited so far in this petition, the merits of this case have been totally overlooked, in RINALDI vs. YEAGER, 86 S. CT. 1497 (1966) where it states,

"equal protection is constitutional right where denial of access to the courts is found."

Appellant-Crossley finds support in UNITED STATES vs. GOOD REAL PROPERTY, supra, as it must also be respectfully seen by review of OWEN vs. HAAS, 661 F. 2d 1242 (1979) states:

Summary judgment reversed as implied power with gross negligence combined with deliberate indifference in local body is a person with proper jurisdiction with right of discovery with failure to state a claim motion reversed as parties have right to amend

> complaint as there is alleged actual and implied knowledge found is civil rights complaint that should not be dismissed at pleading stage."

Curiously the Eighth Circuit engaged in no real historical or legislative analysis of § 1983, 1985(3), 1986. If it had it would have had to address the cases cited in this petition. No analysis of Crossley's liberty and property rights were addressed by the Federal District Court and undoubtedly not reviewed by the Eighth Circuit Court of Appeals.

Petitioner submits that certiorari should be granted because the Eighth Circuit judgment is in conflict with the previous Circuit Court decisions and United States Supreme Court decisions, along with the Iowa Supreme Court decisions. This case should have proceeded to trial on the merits. This Honorable Court should reject the Court of Appeals decision and supervise the application of Iowa Code and Federal Code.

## CONCLUSION

One would have to conclude, therefore, that the highest Court of the land has indeed, provided a clue to whether the irregularities of the District Court should bar redress of federal statutes, Civil Rights, and Constitutional Rights to citizens of this Country. Petitioner maintains that it would be illogical to conclude that this Court would wish to see an inconsistent application of the cases decided by this Honorable Court and Lower Courts. Why would this Honorable Court abandon the Constitution as to some Federal Statutes and not do so as to others? Of course, there is no good reason to suppose, that would be this Court's approach; which makes it important for certiorari to be granted in this case to settle the conflict that has persisted among the circuits on this issue.

Application of the decision in this case undermines the very purpose of 42 U.S.C. §1983,§1985(3), and §1986. This position is taken by several Courts of Appeal. For this reason, Petitioner submits that this Honorable Court should resolve the conflict.

Respectfully submitted,

Barry A. Crossley
Non-lawyer Petitioner
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(320)732-2290

# APPENDIX A - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED JULY 1, 1996

No. 95-1437NISC

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

LARRY A. CROSSLEY,

Plaintiff-Appellant,

V.

Liberty Bank & Trust Co., etc.,
et al.,

Defendants-Appellees.

Order Denying Petition for Rehearing
and Suggestion for Rehearing En Banc

The suggestion for rehearing en banc
is denied.
The petition for rehearing by the panel
is also denied.

Decided and Filed July 1, 1996

Order entered at the discretion
of the Court:
Michael E. Gains
Clerk, U.S. Court of Appeals,
Eighth Circuit

**APPENDIX B - OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED JANUARY 10, 1996**

No. 95-1437

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

**LARRY A. CROSSLEY,**
Plaintiff-Appellant,

V.

**Liberty Bank & Trust Co., etc., et al.,**
Defendants-Appellees.

---

Submitted: December 29, 1995

Filed: January 10, 1996

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Before WOLLMAN, MAGILL, and HANSEN, Circuit Judges.

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PER CURIAM.

Larry Crossley appeals from the district court's[2] orders granting summary judgment in favor of defendants, and denying his motion for reconsideration.

Having carefully reviewed the record and the parties' briefs, we conclude the judgment of the district court was correct. Accordingly, we affirm. See 8th Cir. R. 47B.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH COURT.

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[2]The Honorable Mark W. Bennett, United States District Judge for the Northern District of Iowa.

Supreme Court, U.S.
FILED
SEP 30 1996
CLERK

No. 96-1010

In The

Supreme Court of the United States

October Term, 1996

LARRY A. CROSSLEY

Petitioner,

v.

LIBERTY BANK & TRUST CO., THOMAS J. HROMATKA, C.E.O., HERTZ FARM MANAGEMENT INC., GARY LOOS AS RECEIVER, FARMERS CO-OP ASSOCIATION FOREST CITY, FARMERS CO-OP ELEVATOR CO. LELAND, DON SEVERSON, GARY STERLING, RONALD G. PYLE, RONALD PENNING, AND YET TO BE NAMED JOHN DOES.,

Respondents.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit.

# SUPPLEMENTAL APPENDIX

**LARRY A. CROSSLEY**
Non-Lawyer Petitioner
Route 1, Box 45
Carlos, Mn 56319
(320) 732-2290



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**APPENDIX A - OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA CENTRAL DIVISION FIIED OCTOBER 27, 1994**

No. C93-3083

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA CENTRAL DIVISION

**LARRY A. CROSSLEY,**

Plaintiff,

v.

Liberty Bank & Trust Co., etc., et al.,

Defendants.

**Order Granting Defendants Motions to Dismiss**

This matter comes before the court on the following motions: Defendants Farmers Co-op Elevator of Thompson-Rake[1], Ronald G. Pyle and Ronald Penning's ("Defendant Farmers Co-op Elevator") Motion to Dismiss (#28); Defendants Liberty Bank & Trust[2] and Thomas J. Hromatka's ("Defendant Liberty Bank & Trust") Motion to Dismiss(#29); Defendants Farmers Coop Association of Forest City, Don Severson, and Gary Sterling's ("Defendant Farmers Coop Association") Motion to Dismiss(#30); and Defendants Hertz Farm Management, Inc. and

[1]Defendant Farmers Co-op Elevator of Thompson Rake is incorrectly identified in the Complaint as Farmers Co-op Elevator Co. Thompson and Farmers Co-op Elevator Co. Leland.

[2]Defendant Liberty Bank & Trust is misidentified as Liberty Bank and Trust Co. in the complaint.

Gary Loos as receiver's ("Defendants Hertz and Loos") Motion to Dismiss Hertz Farm Management, Inc. and Gary Loos(#34)[3]. Plaintiff Larry Crossley has filed timely resistance's to Defendants' motions (#31,#37,#38 and #40). These matters are now deemed fully submitted.

## I. BACKGROUND

On July 23, 1991, Plaintiff Larry Crossley filed his *pro se* complaint in *Crossley v. Liberty Bank & Trust*, No. C91-3050 (N.D. Iowa)("*Crossley I*"). In *Crossley I*, Crossley brought an action against Liberty Bank and Trust and other defendants claiming the defendants had violated his constitutional rights, and sought to recover under 42 U.S.C. §1983, §1985, § 1986, the Farm Credit Act, the Truth in Lending Act and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 241 and § 242. The core of Crossley's allegations in *Crossley I* were set out in paragraph 27 of the complaint:

> 27. Defendant FCBT and (Liberty Bank & Trust) with Defendant officials proceeded

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[3]While all four motions to dismiss are Rule 12(b)(6)motions, Defendants Hertz and Liberty Bank & Trust's motions either attach or incorporate by reference two Iowa court decisions concerning the dispute at the center of this case. The two cases, *Crossley v. Lindquist*, No. 2-669/92-593 (Iowa Ct. App. Feb. 23, 1993) and *Liberty Bank and Trust v. Crossley*, No. 13878 (Iowa Dist. Ct. Oct. 13, 1993), are attachments "A" and "B" to Defendant Liberty Bank & Trust's motion. Consideration of these decisions, as matters outside the pleadings, converts Defendant Hertz and Liberty Bank & Trust's respective Rule 12(b)(6) motions into motions for summary judgment. See Fed.R.Civ.P. 12(b)(6) and 56; *Sherwood Medical Indus., Inc. v. Deknatel, Inc.* 512 F.2d 724, 725 n.2 (8th Cir. 1975).

> to obtain Plaintiff's property through the use of notes unsignatured [sic] by Plaintiff knowing their actions were acts of "conversion" through the purchase of said real property at a sheriff's sale wherein Plaintiff's homestead was sold in violation of I.R.C. 561.22 never having been received by Defendants a "waiver" of homestead right, showing complete disregard to Plaintiff's constitutional and civil rights, heretofore described, and did inflict severe irreparable damages upon Plaintiff and innocent third parties.

On April 6, 1992, Judge O'Brien granted a motion to dismiss brought by defendants.

Judge O'Brien ordered that:

> if Plaintiff fails in his attempt to have the Iowa District Court's Order of November, 1990, overturned, he may re-file, without payment of additional fees, any new and different claims than those previously asserted.

*Crossley I*, No. C91-3050, at 9(S.D. Iowa filed Apr. 6, 1992). Judge O'Brien further noted that "[i]f such a refiling occurs the rulings in this case will still apply." *Id.*

On December 22, 1993, Crossley filed his Request to File in this matter. Following some attempts by the court to ascertain whether Crossley had attempted to overturn the Iowa District Court Order of November, 1990, and was raising "new and different claims from

those previously asserted", on May 19, 1994, Judge O'Brien ordered that Crossley had 20 days in which "to file a pleading setting forth any new and different claims he wishes to assert." On June 13, 1994, Crossley filed his 29 page *pro se* complaint in this case against these Defendants concerning their possession of the foreclosed upon real estate which was the subject of *Crossley I* and the sale of crops grown on that property subsequent to the foreclosure. In this case, Crossley asserts claims against Defendants grounded on purported violations of the First, Fourth, Fifth, Seventh and Fourteenth Amendments to the United States Constitution. He also asserts claims based on 18 U.S.C. § 1983, § 1985, § 1986, and pendent claims brought under Iowa Code § 537, § 561, § 646, § 654, and § 680.

## II. FINDINGS OF FACT[4]

On March 23, 1973, Donald and Patricia Crossley entered into a real estate contract with Frances Ballard. In 1985 Donald and Patricia Crossley assigned their equitable interest in the property to the Liberty Bank & Trust.[5] The assignment was recorded on April

[4] The findings of fact include findings made by Judge O'Brien in *Crossley I* in his order granting Defendants' motions to dismiss. These findings also include facts drawn from the exhibits attached to the Complaint. The court notes that none of the parties have submitted a statement of material facts as to which there is a genuine issue to be tried. Furthermore, the parties do not dispute any of the exhibits attached to the Complaint, or the facts contained in those exhibits. The court, therefore, finds that there are no genuine issues of fact with respect to the exhibits attached to the Complaint nor the facts contained in those exhibits.

[5] Defendant Liberty Bank & Trust was formerly known as the Forest City Bank and Trust Company.

16, 1985. On October 31, 1986, Frances Ballard assigned her interest in the Ballard-Crossley contract to Larry Crossley. Subsequently on September 7, 1988, Ballard and Crossley executed an addendum to the assignment to reflect that Crossley would be considered the buyer of the real estate. On September 8, 1988, Donald and Patricia Crossley attempted to revoke their assignment to the Liberty Bank & Trust. On September 20, 1988, Donald and Patricia executed a quit claim deed to Ballard.

On October 20, 1988, Liberty Bank & Trust filed a petition seeking to foreclose upon the real estate. Larry Crossley, Patricia Crossley, and Donald Crossley were all named as Defendants in the foreclosure suit. The Crossley's brought counterclaims based on fraud and breach of contract. The counterclaims were denied and judgment was entered for Liberty Bank & Trust on May 13, 1991.[6] In the decree of foreclosure, the Iowa district court declared that:

> 2. The plaintiff's equitable mortgage as a lien is established as a lien against the real estate described above and is superior and paramount to the interest, liens and claims of the defendants, except to the extent of the vendor's interest in the real estate contract executed on March 23, 1973. The court need not decide in this proceeding whether Frances Ballard or Larry Crossley has legal or equitable title to the property, because that is not in issue in

[6]The decree of foreclosure is attached to the Complaint as Exhibit "A".

> this foreclosure action. The vendor's interest in the property, whomever may later be determined to hold it, is superior to the interest foreclosed upon by the plaintiff.
>
> 3. ...the plaintiff or whoever holds the certificate of purchase at the Sheriff's sale can satisfy the real estate contract underlying the equitable mortgage foreclosed on by plaintiff herein, by tendering the balance due on said contract, which is $95,230.00...The Clerk of Court shall release said real estate proceeds to whomever Frances Ballard and Larry Crossley agree shall be the recipient of said funds or upon further order of whatever court, tribunal, or arbitration panel Frances Ballard or Larry Crossley agree upon to determine the issue of legal title. The determination of legal title as between Frances Ballard and Larry Crossley shall in no way affect or delay plaintiff's foreclosure of its equitable mortgage.

On appeal, the Iowa Court of Appeals affirmed the district court. *See Liberty Bank & Trust v. Crossley*, No. 91-849 (Iowa Ct. App. Dec. 29, 1992).

Following the entry of the foreclosure decree, an execution upon that judgment was issued on May 17, 1991 by the Sheriff of Winnebago County, Iowa. Liberty Bank & Trust purchased the property at a sheriff's sale on July 17, 1991, for $405,271.34. The property

was subject to a six month redemption period.[7]

On February 21, 1992, Crossley filed a petition for declaratory judgment in Iowa District Court for Winnebago County, in which he requested that the sheriff's deed be set aside. The Iowa district court denied Crossley's claim and dismissed the petition. Crossley appealed, and on February 23, 1993, the Iowa Court of Appeals affirmed the decision of the Iowa District Court. *See Crossley v. Lilliquist*, No. 2-669/92-593 (Iowa Ct. App. Feb. 23, 1993.)[8]

While Crossley was appealing the foreclosure, the real estate was placed in receivership and Defendant Hertz Management, Inc. ("Hertz") was appointed the receiver. In 1991, Hertz rented the property to Crossley. On January 21, 1992, Liberty Bank & Trust received a sheriff's deed to the property.[9] In 1992, Hertz did not rent the property to Crossley. Crossley received a notice to quit on March 13, 1992. On March 25, 1992, a forcible entry and detainer action was filed in Iowa small claims court. On April 16, 1992, judgment was entered against Crossley. Crossley posted an appeal bond and appealed the decision. On May 26, 1992, the Iowa District Court reversed, holding that Liberty Bank & Trust should have brought its action in Iowa District Court rather than small claims court. In its ruling, the Iowa District Court also held that: "By this

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[7] A copy of the July 17, 1991, sheriff's certificate of purchase is attached to the Complaint as Exhibit "F".

[8] A copy of the Iowa Court of Appeals decision is attached to Defendant Liberty Bank & Trust's Motion to Dismiss as Exhibit "A".

[9] A copy of the sheriff's deed is attached to the Complaint as Exhibit "H".

ruling, the Court does not intimate that Larry Crossley had paramount title giving him a defense in the FED proceeding." Between March and May 1992, Crossley planted crops on the property. On June 30, 1992, the Winnebago County Sheriff received directions from Liberty Bank & Trust's attorney to proceed with a writ of possession.[10] Crossley was evicted from the property on July 31,1992.

In the fall of 1992, Liberty Bank & Trust had the crops on the property harvested and brought to Defendants Farmers Coop Association Forest City,[11] and Farmers Co-op Elevator of Thompson Rake.[12] Crossley subsequently brought an action in the Iowa District Court concerning his claim, under the doctrine of emblements, for the proceeds of the sales of the crops grown during the 1992 season. On October 13, 1994, the Iowa District court rejected Crossley's claims.[13] The Iowa District Court held that:

> When defendant Larry Crossley planted his crop in May of 1992, he did not have a tenant relationship and, as a result, the doctrine of emblements is not applicable in the instant case. See *Hecht v. Dittman*, 7 N.W. 495, 56 Iowa 679; *Everingham v Brayden*, 12 N.W.2d 142,

---

[10] The directions are attached to the Complaint as Exhibit "J".

[11] Defendant Don Severson is the manager and Defendant Gary Sterling is the assistant manager of Defendant Farmers Coop Association Forest City.

[12] Defendant Ronald Pyle is the manager of Defendant Farmers Co-op Elevator of Thompson Rake.

[13] A copy of the Iowa District Court's decision in *Liberty Bank and Trust v. Crossley*, No. 13978 (Iowa Dist. Ct. Oct. 13, 1993), is attached to Defendant Liberty Bank & Trust's Motion to Dismiss as Exhibit "B".

> 58 Iowa 133; *Goldstein v. Munden*, 210 N.W. 444, 202 Iowa 381. The doctrine of emblements pertains to planted crops prior to a termination of tenancy. See 21A A.Jur.2d, *Crops*, § 25.
>
> The court finds that the defendant Larry Crossley had no right to plant the crop in May of 1992 and therefore has no right under the doctrine of emblements to the proceeds of the crop pursuant to the arguments submitted in defendant's motion.

*Liberty Bank and Trust v. Crossley*, No. 13978, at 3-4 (Iowa Dist. Ct. Oct. 13, 1993).

Crossley also brought motions in that action to dismiss Liberty Bank & Trust's offer of first refusal. On October 1, 1993, the Iowa District Court denied those motions, holding that:

> The Court finds that the plaintiff has complied with the provisions of Section 654.16(a) and has provided the defendants with adequate notice as to the proposed sale as well as giving notice prior to the proper recording of the sheriff's deed, and with the deed being submitted for filing in the proper form and substance.

*Id.* at 6 (Iowa Dist. Ct. Oct. 1, 1993).[4]

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[4] A copy of the Iowa District Court's October 1, 1993, ruling is attached to the Complaint as Exhibit "P.

## *III. ANALYSIS*

### *A. Federal Rule of Civil Procedure 12(b)(6).*

In considering a motion to dismiss for failure to state a claim upon which relief can be granted, a court must accept as true the well-pleaded factual allegations contained in the complaint and view them, together with all reasonable inferences which may be drawn from them, in the light most favorable to the plaintiff. *See Patterson v. Von Riesen*, 999 F.2d 1235, 1237 (8th Cir. 1993); *McCormack v. Citibank, N.A.*, 979 F.2d 643, 646 (8th Cir. 1992); *Murphy v. Lancaster*, 960 F.2d 746, 748 (8th Cir. 1992); *see also Concerned Citizens v. Nuclear Regulatory Comm'n*, 970 F.2d 421, 425 (8th Cir. 1992); *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982); *Sladek v. Bell System Management Pension Plan*, 880 F.2d 972,975 (7th Cir. 1989); *Ellsworth v. City of Racine*, 774 F.2d 182, 184 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986). A dismissal should be granted only if the plaintiff can prove no set of facts that would entitle the plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see McCormack*, 979 F.2d at 646; *Murphy*, 960 F.2d at 748; *see also Dicken v. Ashcroft*, 972 F.2d 231 (8th Cir. 1992).

### *B. Standard for Summary Judgment*

The Eighth Circuit recognizes "that summary judgment is a drastic remedy and must be excercised with extreme care to prevent taking genuine issues of fact away from juries." *Wabun-Inini v. Sessions*, 900 F.2d 1234, 1238 (8th Cir. 1990). On the other

hand, the Federal Rules of Civil Procedure have authorized for nearly 60 years "motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Thus, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.'" *Wabun-Inini*, 900 F.2d at 1238 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)); *Hartnagel v. Norman*, 953 F.2d 394, 396 (8th Cir. 1992).

The standard for granting summary judgment is well established. *Rule 56* of the Federal Rules of Civil Procedure states in pertinent part:

> Rule 56. Summary Judgment
>
> (b) For Defending Party. A party against whom a claim . . .is asserted . . . may, at any time, move for summary judgment in the party's favor as to all or any part thereof.
>
> (c) Motions and Proceedings Thereon. . . . . *The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.*

Fed. R. Civ. P. 56(b) & (c)(emphasis added); *see also Celotex Corp. v Catrett*, 477 U.S. 317, 322-23 (1986); *Munz v. Michael*, 28 F.3d 795, 798 (8th Cir. 1994); *Roth v. U.S.S. Great Lakes Fleet, Inc.*, 25 F.3d 707, 708 (8th Cir. 1994); *Cole v. Bone*, 993 F.2d 1328, 1331 (8th Cir. 1993); *Woodsmith Publishing Co. v. Meredith Corp.*, 904 F.2d 1244, 1247 (8th Cir. 1990); *Wabun-Inini*, 900 F.2d at 1238 (citing *Fed. R. Civ. P.* 56(c)).[15] A court considering a motion for summary judgment must view all the facts in the light most favorable to the nonmoving party, here Crossley, and give Crossley the benefit of all reasonable inferences that can be drawn from the facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)(quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962)); *Munz v. Michael*, 28 F.3d 795, 796 (8th Cir. 1994); *Allison v. Flexway Trucking, Inc.*, 28 F.3d 64, 66 (8th Cir. 1994); *Johnson v. Group Health Plan, Inc.*, 994 F.2d 543, 545 (8th Cir. 1993); *Burk v. Beene*, 948 F.2d 489, 492 (8th Cir. 1991); *Coday v. City of Springfield*, 939 F.2d 666, 667 (8th Cir. 1991), *cert. denied*,___U.S.___, 112 S. Ct. 1170 (1992).

Procedurally, the moving parties, bear "the initial responsibility of informing the district court of the basis for their motion

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[15] An issue of material fact is genuine if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394 (8th Cir. 1992)(citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Hartnagel*, 953 F.2d at 394.

and identifying those portions of the record which show lack of a genuine issue." *Hartnagel*, 953 F.2d at 395 (citing *Celotex*, 477 U.S. at 323); *see also Reed v. Woodruff County, Ark.*, 7 F.3d 808, 810 (8th Cir. 1993). The moving parties are not required by Rule 56 to support their motion with affidavits or other similar materials negating the opponent's claim. *Id.*

"When a moving party has carried its burden under Rule 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Crossley is required under Rule 56(e) to go beyond the pleadings, and by affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324. Although "direct proof is not required to create a jury question, . . . to avoid summary judgment, 'the facts and circumstances relied upon must attain the dignity of substantial evidence and must not be such as merely to create a suspicion.'" *Metge v. Baehler*, 762 F.2d 621,625 (8th Cir. 1985) (quoting *Impro Products, Inc. v Herrick*, 715 F.2d 1267, 1272 (8th Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984)), *cert. denied*, 474 U.S. 1057 (1986). The necessary proof that the nonmoving party must produce is not precisely measurable, but the evidence must be "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Allison v. Flexway Trucking, Inc.*, 28 F.3d 64,66 (8th Cir. 1994).

In *Anderson*, 477 U.S. at 249, *Celotex*, 477 U.S. at 323-24, and *Matsushita*, 475 U.S. at 586-87, the Supreme Court established that a summary judgment motion should be interpreted by the trial court to accomplish its purpose of disposing of factually unsupported claims, and the trial judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Johnson v. Enron Corp.*, 906 F2.d 1234, 1237 (8th Cir. 1990). The trial court, therefore, must "assess the adequacy of the nonmovants' response and whether that showing, on admissible evidence, would be sufficient to carry the burden of proof at trial." *Hartnagel*, 953 F.2d at 396 (citing *Celotex*, 477 U.S. at 322). If the nonmoving party fails to make a sufficient showing of an essential element of a claim with respect to which he has the burden of proof, then the moving parties are "entitled to judgment as a matter of law." *Celotex*, 477 U.S. at 323; *Woodsmith*, 904 F.2d at 1247. However, if the court can conclude that a reasonable trier of fact could return a verdict for the nonmovant, then summary judgment should not be granted. *Anderson*, 477 U.S. at 248; *Burk*, 948 F.2d at 492; *Woodsmith*, 904 F.2d at 1247. With these standards in mind, the court turns to consideration of the Defendants' motions for summary judgment.

### *C. Liberty Bank & Trust's Motion to Dismiss*

The gist of Liberty Bank & Trust's Motion to Dismiss, which the court shall treat as a

motion for summary judgment, is that Crossley's complaint in this case raises no issues which were not previously decided either in *Crossley I* or the Iowa State courts. The court concludes that Defendant Liberty Bank & Trust is arguing that Crossley's claims are barred by res judicata.[6] The court agrees with this assessment.

Res judicata, or claim preclusion, applies if three requirements are met: "(1) the prior judgment was rendered by a court of competent jurisdiction, (2) the prior judgment was a final judgment on the merits, and (3) the same cause of action and the same parties or their privies were involved in both cases." *White v. Kelsey*, 935 F.2d 968, 969 (8th Cir. 1991); *see Murphy v. Jones*, 877 F.2d 682, 684 (8th Cir. 1989); *Headley v. Bacon*, 828 F.2d

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[6]The court notes that Defendant Liberty Bank & Trust's Motion to Dismiss does not use the term "res judicata." Nonetheless, it is clear from the language used in the motion that this is the doctrine being asserted by Defendant Liberty Bank & Trust. For example, in paragraph 12 of the motion to dismiss, it is asserted that "[a]ll issues in Larry Crossley's Complaint have been previously determined in the Iowa Courts as well as this Court."

1272, 1274 (8th Cir. 1987).[17] As the Eight Circuit has pointed out:

> The doctrines of res judicata and collateral estoppel serve to protect the finality of judgments. The doctrines are borne of the recognition that "endless litigation leads to chaos; that certainty in legal relations must be maintained; and that after a party has had his day in court, justice, expediency and preservation of the public tranquillity requires that the matter be at an end."

*Smith v. Updegraff*, 744 F.2d 1354, 1362 (8th Cir. 1984)(quoting *Scroeder v. 171.74 Acres of Land*, 318 F.2d 311,314 (8th Cir. 1968)).

The first two requirements are clearly satisfied here, leaving only the third requirement. In determining whether claims arise from the same cause of action, the Eighth Circuit has indicated that

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[17]In regard to Crossley's pendent state law claims, res judicata is an issue of substantive law requiring the application of the law of the forum state. *Kuehn v. Garcia*, 608 F.2d 1143, 1147 (8th Cir. 1979), *cert. denied*, 445 U.S. 943 (1980). This court, therefore, is required to give preclusive effect to state court judgments whenever the courts of the state would do so. *See Newman Signs, Inc. v Sinner*, 796 F.2d 247, 249 (8th Cir. 1986); *see also Allen v. McCurry*, 449 U.S. 90, 96 (1980). "Under Iowa law res judicata, or claim preclusion, bars relitigation of the same claim between parties or their privies where a final judgment has been rendered upon the merits by a court of competent jurisdiction." *Smith v. Updegraff*, 744 F.2d 1354, 1362 (8th Cir. 1984)(citing *National Farmers Union Property & Casualty Co. v. Nelson*, 260 Iowa 163, 147 N.W.2d839 (1967)). The doctrine of claim preclusion, as applied in Iowa, is therefore applicable under the circumstances of this case. *See generally Brown v. Monticello State Bank*, 360 N.W.2d 81,84 (Iowa 1984); *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981).

> We have adopted the position of the Restatement (Second) of Judgments in determining whether two separately asserted claims arise from the same cause of action for res judicata purposes:
> " 'When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar ...the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose'".

*Poe v. John Deere Co.*, 695 F.2d 1103, 1106 (8th Cir. 1982)(quoting Restatement (Second) of Judgments § 24(1) (1982)). What constitutes a "transaction" or "series of connected transactions" is

> "'to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage'".

*Poe*, supra, 695 F.2d at 1106 (quoting Restatement (Second) of Judgments § 24(2) (1982)). Put another way, whether two

> claims are the same for res judicata purposes depends on whether the claims arise out of the same nucleus of operative fact or are based upon the same factual predicate.

*Murphy*, 877 F.2d at 684-85.

In the prior state court proceedings, and in *Crossley I*, Crossley raised challenges to the propriety of the foreclosure proceedings, the sheriff's sale, the sale of the crops from the 1992 season, and the notice of first refusal. This series of legal actions, which all concerned the events surrounding the foreclosure of the real estate in question, are the same actions which Crossley challenges in this case. The court has little difficulty concluding that the claims asserted by Crossley involve "the same nucleus of operative fact" previously litigated in *Crossley I* and the Iowa State courts. Therefore, the court finds that Crossley's claims against Defendant Liberty Bank & Trust are barred by operation of res judicata, and the court shall grant Defendant Liberty Bank & Trust's motion for summary judgment.

***D. Hertz and Loos' Motion to Dismiss.*** Defendants Hertz and Loos have incorporated the arguments raised by Defendant Liberty Bank & Trust in their motion to dismiss. Crossley's claims against Defendants Hertz and Loos concern the propriety of the sale of the crops for the 1992 season. For the reasons detailed above, the court concludes that Crossley's claims concerning the sale of the

1992 crops are barred by the doctrine of collateral estoppel or issue preclusion.

> Under Iowa law collateral estoppel, or issue preclusion, applies only where four requirements are met: (1)the issue concluded must be identical, (2)the issue must have been raised and litigated in the prior action, (3) the issue must have been material and relevant to the disposition of the prior action, and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

*Smith*, 744 F.2d at 1362 (citing *Mauer v. Rohde*, 257 N.W.2d 489, 497 (Iowa 1977)); *see also Selchert v. State*, 420 N.W.2d 816, 818 (Iowa 1988).

Central to Crossley's claim against Defendants Hertz and Loos is the issue of his right to proceeds for the 1992 season. Application of the collateral estoppel test here clearly indicates that Crossley is barred from relitigating this issue in this forum. The issue of Crossley's interest in the 1992 season was at the center of the Iowa District Court's order of October 13, 1993, in *Liberty Bank and Trust v. Crossley*, No. 13978 (Iowa Dist. Ct. Oct. 13, 1993). That issue was resolved against Crossley in that action. *See* id. at 3. Therefore, the court concludes that Crossley is collaterally estopped from asserting his claims against Defendants Hertz and Loos. Defendants Hertz and Loos' motion for summary judgment is granted.

***E. Farmers Co-op Elevator and Farmers Coop Association's Motions to Dismiss.***[11] Both motions to dismiss raise identical defenses grounded on the Uniform Commercial Code, namely that they were good faith purchasers for value.

Article 2 of the Uniform Commercial Code applies to "transactions in goods." Iowa Code § 554.2102. The definition of "goods" is found in 554.2105(1):

> "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also include the unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 554.2107).

Iowa Code §554.2403 provides that "[a] purchaser of goods acquires all title which the purchaser's transferor had or had power to transfer ...A person with voidable title has power to transfer a good title to a good faith purchaser for value." As the Third Circuit has explained:

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[11] Defendant Farmers Co-op Elevator's Motion to Dismiss is identical in all respects to the motion to dismiss filed by Defendant Farmers Coop Association.

> The good-faith purchaser exception developed over time in order to promote finality in commercial transactions and thus to encourage purchases and to foster commerce. It does so by protecting the title of a purchaser who acquires property for valuable consideration and who, at the time of the purchase, is without notice that the seller lacks valid and transferable title in the property.

*United States v. Lavin*, 942 F.2d 177, 186 (3rd Cir. 1991). In *Johnson & Johnson Products, Inc. v. Dal Int's Trading Co.*, 798 F.2d 100 (3d Cir. 1986), the Third Circuit described the purpose of the good faith purchaser exception:

> The purpose of the good faith purchaser doctrine, codified in Sections 2-403 and 2-102 of the UCC, is to promote commerce by reducing transaction costs; it allows people safely to engage in the purchase and sale of goods without conducting a costly investigation of the conduct and rights of all previous possessors in the chain of distribution.

*Id.* at 104.

At the time the sales of the 1992 crop occurred, Liberty Bank & Trust held a sheriff's deed to the real estate. Even were the court to assume that, at the time the crops were sold to the Defendant elevators, Liberty Bank & Trust only had a voidable title to the crops, the court concludes that from

the allegations contained in the Complaint and the facts drawn from the attachments to the Complaint, the record establishes that Defendant elevators were good faith purchasers for value at the time they purchased the grain. To act in good faith under article 2 of the U.C.C., a party must exhibit honesty in fact and fair dealing. *See* Iowa Code 554.2103(1)(b). There are no allegations in the Complaint that Defendant elevators acted in a dishonest or unfair manner at the time the sales were made. Although Crossley alleges in the Complaint that he told the Defendants that he considered the crops to be his personal property, the Complaint fails to state that this disclosure occurred prior to the sales. Even if the court assumes that the elevators were aware of the dispute over the property, under the circumstances of this case, the court concludes that Defendant elevators were not required to investigate the current status of Liberty Bank & Trust's interests in the crops. *See Johnson & Johnson Products, Inc.*, 798 F.2d at 104; *Robison v. Gerber Products Co.*, 765 F.2d 431, 433(4th Cir. 1985). Thus, because Defendants were good faith purchasers of the crops, Crossley is precluded from recovering against them, and the court shall grant Defendants Farmers Co-op Elevator and Farmers Coop Associations' respective motions to dismiss.

***IV. CONCLUSION***

For the reasons set forth above, the court grants the following motions: (1)Defendants Farmer Co-op Elevator of Thompson-Rake, Ronald G. Pyle, and Donald Penning's Motion to Dismiss; (2) Defendants

Liberty Bank & Trust and Thomas Hromatka's Motion to Dismiss; (3) Defendants Farmers Coop Association of Forest City, Don Severson, and Gary Sterling's Motion to Dismiss; and (4) Defendant Hertz Farm Management, Inc. and Gary Loos as receiver's Motion to Dismiss Hertz Farm Management, Inc. and Gary Loos. Having granting all of Defendants' respective motions to dismiss, the court orders that Plaintiff's complaint be dismissed with prejudice.[19]

**IT IS SO ORDERED.**

**DATED** this 27th day of October, 1994.

MARK W. BENNETT
U.S. DISTRICT COURT JUDGE

[19] The court shall deny Defendants Farmers Coop Association of Forest City, Don Severson and Gary Sterling's Rule 11 Motion for Sanctions (#33) and Defendants Farmers Co-op Elevator of Thompson-Rake, Ronald G. Pyle and Ronald Penning's Rule 11 Motion for Sanctions (#27). Plaintiff has proceeded pro se in this matter which concerns complex questions of commercial, financial and procedural law. A further consideration in denying Defendants' respective motions for sanctions is the fact that Plaintiff was invited by the court to file another case in this court once his state litigation was completed.

## APPENDIX B - OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA CENTRAL DIVISION FILED NOVEMBER 30, 1994

No. C93-3083

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA CENTRAL DIVISION

**LARRY A. CROSSLEY,**

Plaintiff,

v.

Liberty Bank & Trust Co., etc., et al.,

Defendants.

**Order Granting Motion Under Federal Rule of Civil Procedure 52(b) and 59**

This matter comes before the court on Plaintiff Larry Crossley's Motion to Court Pursuant to F.R.C.P., Rules 52(b) and Rule 59 with Motion, Brief and Affidavit in Support of (#45) filed November 4, 1994. Defendants Hertz Farm Management, Inc. and Gary Loos filed a timely resistance to the motion on November 7, 1994. In his motion, Crossley asserts that the court made factual and legal errors in its order of October 27, 1994, granting Defendants' motions to dismiss.

***A. Applicability of Rules 52 and 59***

First, the court notes that under Federal Rule of Civil Procedure 59, the court has authority to reconsider its prior ruling here. *See, e.g., Kort v. Western Surety Co.*, 705 F.2d 278, 280-81 (8th Cir. 1983)(upholding trial court's power, under Rule 59(e), to rescind prior grant of summary judgment). Therefore, the court will consider the merits of Crossley's motion.

***B. Merits of Motion***

Considering Crossley's motion as one properly brought as a motion to reconsider, the court will consider the merits of the issues raised in the motion.

***1. Conversion of Defendants' Motions.***

Crossley asserts that the court erred in converting Defendants Hertz and Liberty Bank & Trust's respective 12(b)(6) motions into motions for summary judgment without first giving him notice of this fact. As the court noted in its decision, the two 12(b)(6) motions were converted to motions for summary judgment when the court considered matters outside the pleadings. In this instance, it was two Iowa state court decisions which were attached to the two defendants respective motions. The fact that matters outside the pleadings had been submitted in support of Defendants' motions could hardly have come as a surprise to Crossley. Furthermore, given the fact that in his resistance to Defendants' motions Crossley submitted matters outside the pleadings, the court was well founded in its assumption that Crossley was treating all Defendants' motions as motions for summary judgment. Finally, given his submission of materials outside the pleadings in support of

his resistance, Crossley does not state what further materials he would have submitted in support of his motion if the court had provided him with explicit notice that it was converting Defendant's motions.

Nevertheless, the Eighth Circuit has pointed out that:

> the procedural requirements of Rule 56 are to be strictly adhered to. *Ailshire v. Darnell,* 508 F.2d 526, 528 (8th Cir. 1974). That rule provides that a motion for summary judgment "shall be served at least 10 days before the time fixed for the hearing." Fed.R.Civ.P. 56(c). The purpose of this notice provision is to allow the opposing party a meaningful opportunity to resist the motion by submitting counteraffidavits. Therefore, the required notice cannot be dispensed with merely because a motion to dismiss is treated as a motion for summary judgment by the district court, and this is true even though more than 10 days have elapsed between the filing of the motion and the entry of the order of dismissal.

*Winfrey v. Brewer,* 570 F.2d 761, 764 (8th Cir. 1978); *see also Williams v. City of St. Louis,* 783 F.2d 114, 116 (8th Cir. 1986); *Jensen v. Klecker,* 599 F.2d 243, 245 (8th Cir. 1979); *Ailshire v. Darnell,* 508 F.2d 526, 527-28 (8th Cir. 1974); *Scott v. Courtesy Inns, Inc.,* 472 F.2d 563, 564 (5th Cir. 1973)

Here, the court concludes that it did not provide Crossley with sufficient notice that it was going to consider Defendants Hertz

Management, Inc. and Liberty Bank and Trust's respective motions to dismiss as motions for summary judgment. Therefore, the court shall permit Crossley and Defendants Hertz Management, Inc., Gary Loos, Liberty Bank & Trust Co., and Thomas J. Hromatka **10 days** in which to file such documents and materials permitted under Federal Rule of Civil Procedure 56 and any supplemental briefs these parties desire to file on the issues raised by Defendants' respective motions for summary judgment. Once these materials are filed, the court will then reconsider its order granting summary judgment for these Defendants.

***2. Motion with Respect to the Other Defendants.*** Although the court will reconsider its decision to grant summary judgment, upon review of the other contentions raised by Crossley in his motion, the court finds no merit in these other issues raised in his motion. The court will briefly touch upon several points raised in the motion.

***a. A Hearing on the Motions.*** Closely tied to the notice issue, Crossley further asserts that the court should not have ruled on the motions without first holding a hearing. It must be noted that none of the parties requested a hearing, and given the state of the record, the court was of the belief that none was necessary for proper disposition of the motions.

Federal Rule of Civil Procedure 78 provides in pertinent part:

> To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief

written statements of reasons in support and opposition.

Local Rule 14(c) provides that:

> Motions shall be submitted and determined upon the papers hereinafter provided. Oral argument of motions may be had on the court's own motion or on the written request and showing of cause by any party and upon order of the court. Such request shall be separately stated at the conclusion of the motion or memorandum and shall be noted in the caption.

The Eighth Circuit has upheld similar rules. *See Parish v. Howard,* 459 F.2d 616, 620 (8th Cir. 1972). Therefore, the court finds that the mere fact that it decided the motions without first holding a hearing on the motions provides no basis for relief from the court's previous order.

***b. Notice of Motion.*** Crossley asserts that the court erred in ruling on the motions to dismiss to quickly following Defendant Hertz's attorney's submission of an affidavit in which he lays a foundation for one of the two Iowa court cases submitted with the motion to dismiss. The affidavit and attachments were served on Crossley on October 21, 1994, and the court ruled on the Defendants' motion on October 27, 1994. The court, however, did not consider any matters raised in the affidavit and makes no reference to it in its decision. Furthermore, Crossley again fails to state what, if any, materials he would have filed in response to the affidavit.

***c. Factual Findings of the Court.*** Crossley also takes issue with a number of statements in the opinion. As an example, Crossley asserts in paragraph 6 that:

> 6. This Court is in error on page 14 of order, "Plaintiff did not in **CROSSLEY I**, challenge the sale of crops, or notice of first refusal, or Defendant Bank's possession of homestead. These events had not happened at the time of **CROSSLEY I** took place.

The court, however, never made such a statement. What the court did state was:

> *In the prior state court proceedings*, and in *Crossley I*, Crossley raised challenges to the propriety of the foreclosure proceedings, the sheriff's sale, the sale of the crops from the 1992 season, and the notice of first refusal.

*Crossley v. Liberty Bank & Trust Co.*, No. C93-3083, at 14 (S.D. Iowa Oct. 27, 1994)(emphasis added). Although the language might possibly be interpreted by the reader to conclude that Crossley raised the same issues in the state court proceedings as he raised in *Crossley I*, the language was only intended to set forth the type of claims Crossley had raised in either his previous state court proceedings or in *Crossley I*. The court finds no error in this or any of the other factual contentions raised by Crossley.

***d. Other Assertions.*** The court has considered all of Crossley's other assertions and finds them to be without merit.

***C. Conclusion***

The court will grant Crossley's motion in so far as it will reconsider its prior ruling granting the Defendants' respective motions for summary judgment. Crossley and Defendants Hertz Management, Inc., Gary Loos, Thomas J. Hromatka and Liberty Bank & Trust Co. shall have **10 days** in which to supplement the record if they so desire, including the filing of supplemental briefs on the issues raised by Defendants' respective motions for summary judgment.

With respect to the other Defendants, having found no basis for the court to modify or amend its prior ruling in this matter, the court shall deny Crossley's motion as to these Defendants' respective motions to dismiss.

**IT IS SO ORDERED.**

**DATED** this 30th day of November, 1994.

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MARK W. BENNETT
UNITED STATES DISTRICT JUDGE

## APPENDIX C - OPINION OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA CENTRAL DIVISION FILED JANUARY 5, 1995

No. C93-3083

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF IOWA CENTRAL DIVISION

**LARRY A. CROSSLEY,**

Plaintiff,

v.

Liberty Bank & Trust Co., etc., et al.,

Defendants.

**Order Denying Motion Under Federal Rule of Civil Procedure 52(b) and 59**

This matter comes before the court on Plaintiff Larry Crossley's Motion to Court Pursuant to F.R.C.P., Rules 52(b) and Rule 59 with Motion, Brief and Affidavit in Support of (#45) filed November 4, 1994. Defendants Hertz Farm Management, Inc. and Gary Loos filed a timely resistance to the motion on November 7, 1994, and December 14, 1994. In his motion, Crossley asserts that the court made factual and legal errors in its order of October 27, 1994, granting Defendants' motions to dismiss. On November 30, 1994, the court entered an order on Crossley's motion in which the court indicated that it would reconsider

it prior ruling granting Defendants' Hertz Farm Management, Inc. and Gary Loos ("Hertz"), and Liberty Bank & Trust Co.'s respective 12(b)(6) motions, which the court had converted into motions for summary judgment, on the grounds that it had converted and considered the 12(b)(6) motions into motions for summary judgment without first giving Crossley notice of this fact. A telephonic hearing on Crossley's motion was held on December 22, 1994. Plaintiff appeared pro se. Defendant Hertz was represented by Hayward L. Draper and Defendant Liberty Bank & Trust Co. was represented by Robert P. Cooper.[1]

The court converted Defendants' respective 12(b)(6) motions to dismiss into motions for summary judgment because the court took into account not only the allegations of the complaint, but also certain facts set out in public documents Defendants had attached to their motions. Such consideration or records and documents not attached to the complaint, or not expressly incorporated therein, is typically forbidden, unless the proceeding is properly converted into one for summary judgment under Rule 56. *See* Fed.R.Civ.P. 12(b)(6). "However, courts have made narrow exceptions for documents the authenticity of which are not disputed by the parties; for official public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint." *Watterson v. Page*, 987 F.2d 1,3 (1st Cir. 1993); *see Henson v. CSC Credit Serv.*, 29 F.3d

[1] The parties are to be commended for their presentation of this matter. Crossley's *pro se* presentation was well prepared and he conducted himself in a competent and professional manner.

280, 284 (7th Cir. 1994); *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 687 (1994); *Allen v. Westpoint-Pepperell, Inc.*, 945 F.2d 40,44 (2d Cir. 1991) *United States v. Wood*, 925 F.2d 1580, 1582 (7th Cir. 1991); *Chester County Intermediate Unit v. Pennsylvania Blue Shield*, 896 F.2d 808, 812 (3rd Cir. 1990); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1198 (9th Cir. 1988) *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988) *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986); *Mack v. South Bay Beer Distrib., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986), *overruled on other grounds by Astoria Fed. Sav. and Loan Assoc. v Solimino*, 501 U.S. 104 (1991); *see also Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 8759 n. 3 (1st Cir. 1991); *Fudge v. Penthouse Int'l, Ltd.*, 840 F.2d 1012, 1014-15 (1st Cir.), *cert. denied*, 488 U.S. 821 (1988); *In re Wade*, 969 F.2d 241, 249 & n. 12 (7th Cir. 1992). *See generally* 5A C. Wright and A. Miller, *Federal Practice and Procedure* § 1357 (1990)("In determining whether to grant a Rule 12(b)(6) motion, the court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account.").

Accordingly, the court's decision of October 27, 1994, to convert Defendants' respective motions to dismiss to motions for summary judgment was unnecessary since the two state court documents were matters of public record which the court was free to consider in

deciding Defendants' motions. Thus, because summary judgment was not in fact involved, the court did not error in not fully complying with Rule 56's notice requirements. *See Mack*, 798 F.2d at 1282.

Even if the exception noted above is inapplicable in this case and the court was required to consider Hertz's and Liberty Bank and Trust Co.'s motions to dismiss as motions for summary judgment, the court has now provided the parties with the opportunity to supplement the record and be heard on those motions. Upon consideration of the merits of the parties' arguments, including those found in the parties' supplemental materials, the court has reconsidered its decision to grant summary judgment. The court concludes, however, that having found no basis upon which to modify or amend its prior decision to grant Defendants' respective motions for summary judgment, the court shall deny Crossley's motions with respect to these Defendants' motions for summary judgment.

The court, therefore, concludes, because no error was committed by it in ruling on Defendants' motions to dismiss, that Crossley's Motion to Court Pursuant to F.R.C.P., Rules 52(b) and Rule 59 with Motion, Brief and Affidavit in Support of (#45) is **DENIED.**

**IT IS SO ORDERED.**

**DATED** this 5th day of January 1995.

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MARK W. BENNETT
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
JAN 24 1997
CLERK

No. 96-1010

In The

# Supreme Court of the United States

October Term, 1996

LARRY A. CROSSLEY,

*Petitioner,*

vs.

LIBERTY BANK & TRUST CO., THOMAS J. HROMATKA, C.E.O., HERTZ FARM MANAGEMENT INC., GARY LOOS AS RECEIVER, FARMERS CO-OP ASSOCIATION FOREST CITY, FARMERS CO-OP ELEVATOR CO. LELAND, DON SEVERSON, GARY STERLING, RONALD G. PYLE, RONALD PENNING, AND YET TO BE NAMED JOHN DOES,

*Respondents.*

**On Petition For Certiorari To The United States Court Of Appeals For The Eighth Circuit**

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

THOMAS H. WALTON
NYEMASTER, GOODE, MCLAUGHLIN, VOIGTS, HANSELL & O'BRIEN, P.C.
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*Attorney for Respondents Hertz Farm Management, Inc. and Gary Loos as Receiver*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED FOR REVIEW

Defendants Hertz Farm Management, Inc. and Gary Loos as Receiver dispute that this matter presents any issues that warrant grant of Plaintiff's Petition for Writ of Certiorari. The "Questions Presented for Review" set forth in Plaintiff's Petition are overly broad and not sufficiently specific to identify for this Court the particular issues that might justify issuance of a Writ of Certiorari. For this reason, Plaintiff's Petition for Writ of Certiorari should be denied. *Sup.Ct.R.* 14(4). In any event, the district court did not depart from the accepted usual course of judicial proceedings and there is no sufficiently important conflict between or among any courts on any issue justifying a grant of Plaintiff's Petition for Writ of Certiorari.

## PARTIES TO THE PROCEEDING

Defendants Hertz Farm Management, Inc. and Gary Loos as Receiver have no objection to Plaintiff's description of them as parties to this action. Hertz Farm Management, Inc. is a wholly-owned subsidiary of Hertz Associates, Ltd. Hertz Farm Management, Inc. has no corporate subsidiaries.

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## STATEMENT OF THE CASE

Defendants Hertz Management, Inc. and Gary Loos as Receiver (hereinafter referred to collectively as "Hertz"), set forth below those facts pertinent to Plaintiff's claims against them and his Petition for Writ of Certiorari. Plaintiff's Statement of the Case is so prolix and fraught with misstatements and omissions of important facts that a point-by-point refutation would be very difficult and confusing. Instead, Defendants Hertz have attempted to set forth as completely and accurately as possible the course of relevant events in this matter.

Plaintiff's claims in this matter, however styled, arise out of his eviction from certain property and subsequent sale of crops on or after July 31, 1992 grown on that property.

Previously, on or about May 13, 1991, Liberty Bank & Trust Co. (hereinafter "the Bank") had obtained a Decree of Foreclosure upon all the land in question, including any alleged homestead interest of Plaintiff's. (*See* Appendix E). This foreclosure judgment was affirmed by the Iowa Court of Appeals on December 29, 1992. (*See* Appendix A at 5). As Plaintiff had not posted a supersedeas bond pending appeal, the Bank evicted Plaintiff from the property and had the crops sold pursuant to a Sheriff's Deed dated January 21, 1992, and a Writ of Possession issued pursuant to the foreclosure judgment. (*See* Appendix A at 5-6).

Thereafter, on February 21, 1992, Plaintiff filed a Petition in state court for a declaratory judgment and temporary injunction naming Hertz, among others, as a Defendant. He claimed that he was the owner of the

property and asked that the Sheriff's Deed be set aside. The trial court dismissed Plaintiff's Petition and he appealed. (*See* Appendix F).

On February 23, 1993, the Iowa Court of Appeals affirmed the trial court's dismissal of Plaintiff's Petition finding that it was "clearly a collateral attack upon the judgment of foreclosure" without a legal basis. The Court of Appeals further determined Plaintiff's alleged vendor's interest was not an interest in the real estate. (*See* Appendix F).

Undaunted, in the state court action in which the foreclosure had been entered in favor of the Bank, Plaintiff moved the Court to order that the 1992 crop or its proceeds be turned over to him. Plaintiff argued that he was entitled to the proceeds of the 1992 crop based upon the doctrine of emblements, which is the right of a tenant to take and carry away after termination of the tenancy crops resulting from his own care and labor. (*See* Appendix G).

On October 13, 1993, the trial court denied Plaintiff's Motion for the turnover of the 1992 crop, finding that he had not planted the crop prior to the termination of his tenancy, and therefore, had no right to the 1992 crop or its proceeds. This Order became final when Plaintiff failed to file a timely Notice of Appeal. *Id.*

On July 23, 1991, on the heels of Plaintiff's loss in the state foreclosure action and while his appeal of the foreclosure judgment was pending before the Iowa Court of Appeals, he filed a Complaint in federal court naming, among others, Liberty Bank and Trust Co. as a Defendant, alleging violations of his constitutional rights and various

federal statutes. The core of Plaintiff's allegations were set out in paragraph 27 of his Complaint. There he alleged that the defendants had violated his constitutional and civil rights by purchasing his alleged homestead interest at the sheriff's sale in violation of Iowa Code Section 561.22.

On April 6, 1992, the court, the Honorable Judge Donald E. O'Brien presiding, recognizing the preclusive effect of the foreclosure judgment upon Plaintiff's claim of an interest in the property, dismissed Plaintiff's claims, noting that he had appealed the judgment in the state foreclosure action. Judge O'Brien observed:

> If he were to prevail on the appeal, he would probably have the relief he is seeking, however, if he does not prevail on said appeal, he may refile in this court without paying further filing fees. If such a refiling occurs, the rulings in this Order will still apply. The court will, however, consider any new claims Plaintiff might feel he has.
>
> . . .
>
> It is further ordered that if plaintiff fails in his attempt to have the Iowa District Court's Order of November, 1990, overturned, he may refile, without payment of any additional fees, any new and different claims than those previously asserted.

(*See* Appendix H).

As indicated, this Order provided that, if Plaintiff failed to overturn the judgment of foreclosure, he could assert other claims "new and different" than, or in other

words, unrelated to his prior claims to an interest in the property or crops.

Subsequently, on June 13, 1994, after the Iowa Court of Appeal's ruling of December 29, 1992, affirming the foreclosure decree, Plaintiff filed his second federal court action, which is the subject of his Petition. In general, Plaintiff alleged in his Complaint various violations of the United States Constitution, federal civil rights statutes and state statutes. Specifically, regarding Hertz, Plaintiff alleged that it wrongfully permitted the removal of or conspired to deprive him of the 1992 crop and generally engaged in a conspiracy with the other Defendants to deprive him of his alleged homestead interest in the property. (*See* Appendix A). These were not "new and different" claims as expected by Judge O'Brien.

On October 27, 1994, the trial court dismissed all of the Plaintiff's claims against all Defendants. As the Court considered matters outside the pleadings, at that time, it treated the various Rule 12(b)(6) motions as motions for summary judgment under Rule 56. (*See* Appendix A).

On November 30, 1994, pursuant to Plaintiff's Motion to Reconsider, the Court concluded that it had not provided Plaintiff with sufficient notice, as required by Federal Rule 56(c), that it was going to consider the motions to dismiss as motions for summary judgment. Accordingly, the Court permitted the parties an additional ten days within which to supplement the record, if they so desired, on the respective motions. (*See* Appendix B).

On January 5, 1995, the Court affirmed its Order of October 27, 1994, in all respects and also concluded that it had not erred in converting Defendants' Rule 12(b)(6)

motions into motions for summary judgment, indicating such conversion had not been necessary. (*See* Appendix C).

On February 2, 1995, Plaintiff filed his Notice of Appeal of the District Court's judgment to the United States Court of Appeals.

On January 10, 1996, the Eighth Circuit affirmed the judgment of the District Court.

On July 1, 1996, the United States Court of Appeals for the Eighth Circuit denied Plaintiff's suggestion for rehearing en banc and his petition for rehearing by the panel.

## ARGUMENT

### I. THERE WAS NO DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS BELOW.

Plaintiff first seeks a Writ of Certiorari based upon alleged procedural irregularities below. In summary, Plaintiff challenges the proceedings below on the following grounds: 1) he was denied adequate time to conduct discovery prior to the trial court's ruling on Defendants' motions despite a request to do so, and 2) the trial court could not, *sua sponte*, treat Defendants' 12(b)(6) motions as motions for summary judgment or abused its discretion in doing so. Each of these meritless arguments will be addressed briefly below in order.

**A. The trial court properly exercised its discretion in not permitting Plaintiff to conduct discovery.**

The standard of review of a trial court's decision whether to permit discovery in support of a resistance to a motion for summary judgment pursuant to Rule 56(f) is abuse of discretion. *Mills v. Damson Oil Corp.*, 931 F.2d 346, 351 (5th Cir. 1991). "While Rule 56(c) allows courts to consider depositions, answers to interrogatories and admissions on file in ruling on motions for summary judgment, it does not require that discovery take place before a motion for summary judgment may be considered." *Walker v. U.S. EPA*, 802 F. Supp. 1568, 1576 (S.D. Tex. 1992). "When the discovery sought is irrelevant to the court's consideration of a pending motion, summary judgment can and should be granted without discovery." *Id.; see also, Mills*, 931 F.2d at 350. The party seeking discovery in support of its resistance to a motion for summary judgment must demonstrate a need for such discovery. *Walker*, 802 F. Supp. at 1577. A request to conduct discovery in support of a resistance to a motion for summary judgment must be supported by an affidavit setting forth reasons why the party cannot present facts essential to justify the party's opposition. *Fed. R. Civ. P.* 56(f).

The issue presented to the district court by the motion of Hertz centered on the claim or issue preclusive effect of prior adjudications involving Plaintiff and some of these Defendants. While Plaintiff in his supplemental filing below made a broad statement to the effect that he had not been afforded the opportunity to conduct discovery or that he had a right to full discovery, as he does in

his Petition, he never articulated beyond bare conclusions what he hoped further discovery would reveal that would assist him in resisting Defendants' motions based upon the prior final adjudications. Assuming there were as yet undiscovered facts that would have assisted Plaintiff in resisting Defendants' motions, he never explained why he was unable to present those facts, despite the fact that he had been engaged in litigation with some or all of the Defendants since 1988.

It is within a trial court's discretion to rule on a motion for summary judgment without further discovery where the opposing party fails to "present the trial court with any evidence of what further discovery could produce." *Bettin v. Nelson*, 744 F.2d 53, 58 (8th Cir. 1984). As the Eighth Circuit has observed:

> Rule 56(f) is not a shield that can be raised to block a motion for summary judgment without even the slightest showing by the opposing party that his opposition is meritorious. A party invoking its protections must do so in good faith by affirmatively demonstrating why he cannot respond to a movant's affidavits as otherwise required by Rule 56(e) and how postponement of a ruling on the motion will enable him, by discovery or other means, to rebut the movant's showing of the absence of a genuine issue of fact. Where, as here, a party fails to carry his burden under Rule 56(f), postponement of a ruling on a motion for summary judgment is unjustified.

*Willmar Poultry Co. v. Morton-Norwich Products, Inc.*, 520 F.2d 289, 297 (8th Cir. 1975), *cert. denied*, 424 U.S. 915, 96

S.Ct. 1116, 47 L.Ed.2d 320 (1976). There were no procedural irregularities below regarding Plaintiff's request to conduct further discovery.

**B. The trial court did not err in its treatment of Defendants' motions.**

Plaintiff also complained about the trial court's treatment of Defendants' 12(b)(6) motions. First, as the trial court correctly observed in its January 5 order, it did not need to treat Defendants' motions as motions for summary judgment under Rule 56 because the matters outside the pleading considered by it were undisputed official public records and exhibits attached to Plaintiff's Complaint. The extensive string citation relied by the trial court in this issue will not be repeated here.

While the trial court's earlier decision to convert Defendants' motions to dismiss into motions for summary judgment was unnecessary (and therefore, the Court did not need to comply with Rule 56's notice requirements), out of an abundance of caution and with due regard for the rights of the parties, the Court permitted them additional time to file supplemental pleadings. If the rule relied upon by the Court to consider matters outside the pleadings in ruling on Defendants' 12(b)(6) motions is not applicable, the Court nevertheless complied with Rule 56's notice requirements.

A party need not file a motion for summary judgment or request that its 12(b)(6) motion be treated as a motion for summary judgment before the court may properly do so. A court, *sua sponte*, may convert a motion under Rule 12(b)(6) into one for summary judgment if,

within the discretion of the trial court, the consideration of material outside the pleadings, and the resulting conversion from Rule 12(b)(6) to Rule 56, is likely to facilitate the disposition of the action. *See Collins v. Palczwski*, 841 F. Supp. 333, 335 (D. Nev. 1993); Wright and A. Miller 5A *Federal Practice and Procedure* § 1366 (Supp. 1995). The trial court did not abuse its discretion with respect to the procedure it followed to decide Defendants' Motions.

## II. THERE IS NO CONFLICT BETWEEN OR AMONG ANY COURTS ON ANY ISSUE JUSTIFYING REVIEW BY THIS COURT.

Plaintiff, in his Petition, rarely, if ever, directly addresses the propriety of the application by the courts below of the principles of claim and issue preclusion to dismiss his claims against Hertz and the other Defendants. In his Petition Plaintiff never specifically identifies any conflict between or among any courts regarding any relevant issue of law. The courts properly held as a matter of law that Plaintiff's claims against Hertz were barred as a result of the preclusive of prior adjudications. The basic allegations underlying all of Plaintiff's claims are that he was improperly deprived of an alleged homestead interest and the 1992 crop. Prior final adjudications have either decided these issues, or necessary predicate issues, against Plaintiff or he failed to raise these claims when, logically, he should have in prior litigation involving Hertz, barring their later litigation. The decisions of the courts below were based upon the proper and consistent application of well-recognized principles of law.

**A. The trial court correctly held as a matter of law that Plaintiff is precluded from relitigating his interest in the 1992 crop.**

The first, and most obvious, basis for dismissal of Plaintiff's claims against Hertz for the 1992 crop was directly addressed by the trial court. The trial court correctly observed that Plaintiff's claims against Defendant Hertz concern the propriety of the sale of the 1992 crop. The Court stated: "Central to Crossley's claim against Defendants Hertz and Loos is the issue of his rights to the proceeds for the 1992 season."

Previously, in the state court foreclosure action, Plaintiff claimed a right to the 1992 crops and demanded that the crop or its proceeds be turned over to him. By Order dated October 13, 1993, the Court denied Plaintiff's request concluding:

> The Court finds that Defendant Larry Crossley had no right to plant a crop in May of 1992 and therefore has no right under the doctrine of emblements to the proceeds of the crop.

(*See* Appendix G). This Order became final upon expiration of the appeal period. Plaintiff did not appeal this Order.

Collateral estoppel or issue preclusion applies if the following requirements are met: (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment. *Smith v. Updegraph*, 744 F.2d 1354,

1363 (8th Cir. 1984); *Selchert v. State*, 420 N.W.2d 816, 818 (Iowa 1988); *Mauer v. Rohde*, 257 N.W.2d 489, 497 (Iowa 1977).

The issue of Plaintiff's right to the 1992 crop or its proceeds, which must underlie his claim in this case of wrongful taking of the crop by Hertz, was previously raised, litigated and necessarily decided against him in the Iowa state court foreclosure action. As a matter of law, Plaintiff had no right to the 1992 crop or its proceeds of which Hertz or any of the other Defendants could have wrongfully deprived him. The trial court correctly so held. If Plaintiff believed the state court had wrongly decided his claim to an interest to the 1992 crop, the proper procedure would have been to appeal that Order, not to collaterally attack in a subsequent action, as he did below.

**B. The trial court correctly held as a matter of law that Plaintiff is precluded from relitigating his alleged interest in the real estate.**

While Plaintiff's claims are unclear, to the extent that Plaintiff seeks to hold Hertz liable for the alleged wrongful deprivation of his claimed homestead interest, Plaintiff is similarly barred from litigating his interest in the property by virtue of prior adverse adjudications.

Several issues prerequisite to Plaintiff's claim of an alleged wrongful deprivation of a homestead on the property have previously been decided against him. First, the Bank's equitable mortgage was established as a lien against *all* of the real estate in question, including any

alleged homestead, and found to be superior and paramount to the interest, liens and claims of the Defendants in the state foreclosure action, which included Larry Crossley, subject only to a vendors' interest in the property. The time for Plaintiff to have asserted his alleged homestead interest was in the foreclosure proceeding. As it was, he did not, and the issue of who had the superior interest in the entire property was decided against him.

Second, in Plaintiff's declaratory judgment and injunction action filed on February 21, 1992, in state court, in which Plaintiff named Hertz as a defendant, wherein Plaintiff claimed he was the owner of the property and sought to set aside the Sheriff's Deed to the Bank, the Iowa Court of Appeals ultimately decided that Plaintiff, as the purported vendor on a contract for the sale of the property, only had a personal property interest in the contract, not an ownership interest in the real estate. "Generally, there can be no homestead right without ownership, legal or equitable." *Kleinsorge v. Clark*, 232 Iowa 313, 4 N.W.2d 433, 434 (1942). In this case, to establish a wrongful deprivation of a homestead interest, Plaintiff must first establish such an interest in the real estate. However, to do so constitutes an improper collateral attack on the prior adjudications of his interest in the real estate, or more accurately, his lack thereof. As a party to Plaintiff's declaratory judgment action, Hertz is entitled to the claim preclusive effect of that judgment. *White v. Kelsey*, 935 F.2d 968, 969 (8th Cir. 1991). Therefore, the trial court did not err in dismissing Plaintiff's claims to an interest in the real estate as a matter of law.

Similarly, other unchallenged prior court orders regarding Hertz precluded Plaintiff's claims against it in

federal court. On April 20, 1993, the state court in the foreclosure action ordered that Hertz would be discharged as receiver upon payment of the balance of the receivership. (*See* Appendix D). No objection had been lodged to Hertz' discharge, and Plaintiff did not challenge this Order.

On May 28, 1993, Hertz notified the state court of the payment of the balance of the receivership account to Donald A. and Patricia Crossley. *Id.* Previously, as the legal result of the Sheriff's Deed of the property to the Bank dated January 21, 1992, Hertz' practical duties as receiver ended. Where ownership of property in receivership is established, "the adjudged owner is entitled to possession and there can be no legal or equitable reason for the receiver further to administer the receivership property." *Rudolph v. Davis*, 237 Iowa 1383, 25 N.W.2d 332, 335 (1946).

Upon discharge of Hertz as receiver by the Court, Hertz was released from any liability arising from the receivership and could not thereafter be sued in its official capacity, as it is here. 75 C.J.S. *Receivers* § 96 (1952). An order discharging a receiver is not subject to collateral attack in a later proceeding. *Id.* In *Miller v. Everest*, 212 N.W.2d 523, 524-25 (Iowa 1973), a premises liability action against a former receiver of the property, the Court observed that the effect of a valid discharge is to release the receiver of any liability in its official capacity. Further, in sustaining the dismissal of Plaintiff's claims against the receiver, the Court held that a claim based upon a receiver's failure "to perform acts which he had a duty to perform as receiver" is a claim against the receiver in its

official capacity. *Id.* at 526. Upon this basis, the decisions of the courts below were correct.

## CONCLUSION

Defendants-Appellees Hertz Farm Management, Inc. and Gary Loos as Receiver respectfully request that the Petition for Writ of Certiorari by Plaintiff-Appellant Larry Crossley be denied.

Respectfully submitted,

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## APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

| | | |
|---|---|---|
| LARRY CROSSLEY,<br><br>Plaintiff,<br><br>vs.<br><br>LIBERTY BANK AND TRUST CO., THOMAS J. HROMATKA, C.E.O., HERTZ MANAGEMENT INC., GARY LOOS AS RECEIVER, FARMERS COOP ASSOCIATION FOREST CITY, FARMERS CO-OP ELEVATOR CO. THOMPSON, FARMERS CO-OP ELEVATOR CO. LELAND, DON SEVERSON, GARY STERLING, RONALD G. PYLE, RONALD PENNING AND YET TO BE NAMED JOHN DOES<br><br>Defendants. | : | NO. C93-3083<br><br>**ORDER REGARDING MOTIONS TO DISMISS**<br><br>(Filed Oct. 27, 1994) |

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This matter comes before the court on the following motions: Defendants Farmers Co-op Elevator of Thompson-Rake[1], Ronald G. Pyle and Ronald Penning's

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[1] Defendant Farmers Co-op Elevator of Thompson Rake is incorrectly identified in the Complaint as Farmers Co-op Elevator Co. Thompson and Farmers Co-op Elevator Co. Leland.

("Defendant Farmers Co-op Elevator") Motion to Dismiss (#28); Defendants Liberty Bank & Trust[2] and Thomas J. Hromatka's ("Defendant Liberty Bank & Trust") Motion to Dismiss (#29); Defendants Farmers Coop Association of Forest City, Don Severson and Gary Sterling's ("Defendant Farmers Coop Association") Motion to Dismiss (#30); and Defendants Hertz Farm Management, Inc. and Gary Loos as receiver's ("Defendants Hertz and Loos") Motion to Dismiss Hertz Farm Management, Inc. and Gary Loos (#34).[3] Plaintiff Larry Crossley has filed timely resistances to Defendants' motions (#31, #37, #38 and #40). These matters are now deemed fully submitted.

## *I. BACKGROUND*

On July 23, 1991, Plaintiff Larry Crossley filed his *pro se* complaint in *Crossley v. Liberty Bank & Trust*, No. C91-3050 (N.D. Iowa) ("*Crossley I*"). In *Crossley I*, Crossley brought an action against Liberty Bank and Trust and

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[2] Defendant Liberty Bank & Trust is misidentified as Liberty Bank and Trust Co. in the Complaint.

[3] While all four motions to dismiss are Rule 12(b)(6) motions, Defendants Hertz and Liberty Bank & Trust motions either attach or incorporate by reference two Iowa court decisions concerning the dispute at the center of this case. The two cases, *Crossley v. Lindquist*, No. 2-669/92-593 (Iowa Ct. App. Feb. 23, 1993) and *Liberty Bank and Trust v. Crossley*, No. 13878 (Iowa Dist. Ct. Oct. 13, 1993), are attachments "A" and "B" to Defendant Liberty Bank & Trust's motion. Consideration of these decisions, as matters outside the pleadings, converts Defendant Hertz and Liberty Bank & Trust's respective Rule 12(b)(6) motions into motions for summary judgment. *See* Fed.R.Civ.P. 12(b)(6) and 56; *Sherwood Medical Indus., Inc. v. Deknatel, Inc.*, 512 F.2d 724, 725 n.2 (8th Cir. 1975).

other defendants claiming the defendants had violated his constitutional rights, and sought to recover under 42 U.S.C. § 1983, § 1985, § 1986, the Farm Credit Act, the Truth in Lending Act and the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. § 241 and § 242. The core of Crossley's allegations in *Crossley I* were set out in paragraph 27 of the complaint:

> 27. Defendant FCBT and [Liberty Bank & Trust] with Defendant officials proceeded to obtain Plaintiff's property through the use of notes unsignatured [sic] by Plaintiff knowing their actions were acts of "conversion" through the purchase of said real property at a sheriff's sale wherein Plaintiff's homestead was sold in violation of I.R.C. 561.22 never having been received by Defendants a "waiver" of homestead right, showing complete disregard to Plaintiff's constitutional and civil rights, heretofore described, and did inflict severe irreparable damages upon Plaintiff and innocent third parties.

On April 6, 1992, Judge O'Brien granted a motion to dismiss brought by defendants. Judge O'Brien ordered that:

> if Plaintiff fails in his attempt to have the Iowa District Court's Order of November, 1990, overturned, he may re-file, without payment of additional fees, any new and different claims than those previously asserted.

*Crossley* No. C91-3050, at 9 (S.D. Iowa filed Apr. 6, 1992). Judge O'Brien further noted that "[i]f such a refiling occurs the rulings in this case will still apply." *Id.*

On December 22, 1993, Crossley filed his Request to File in this matter. Following some attempts by the court to ascertain whether Crossley had attempted to overturn the Iowa District Court Order of November, 1990, and was raising "new and different claims from those previously asserted", on May 19, 1994. Judge O'Brien ordered that Crossley had 20 days in which "to file a pleading setting forth any new and different claims he wishes to assert." On June 13, 1994, Crossley filed his 29 page *pro se* complaint in this case against these Defendants concerning their possession of the foreclosed upon real estate which was the subject of *Crossley I* and the sale of crops grown on that property subsequent to the foreclosure. In this case, Crossley asserts claims against Defendants grounded on purported violations of the First, Fourth, Fifth, Seventh and Fourteenth Amendments to the United States Constitution. He also asserts claims based on 18 U.S.C. § 1983, § 1985, § 1986, and pendent claims brought under Iowa Code § 537, § 561, § 646, § 654, and § 680.

## *II. FINDINGS OF FACT*[4]

On March 23, 1973, Donald and Patricia Crossley entered into a real estate contract with Frances Ballard. In 1985 Donald and Patricia Crossley assigned their equitable interest in the property to the Liberty Bank & Trust.[5] The assignment was recorded on April 16, 1985. On October 31, 1986, Frances Ballard assigned her interest in the Ballard-Crossley contract to Larry Crossley. Subsequently on September 7, 1988, Ballard and Crossley executed an addendum to the assignment to reflect that Crossley would be considered the buyer of the real estate. On September 8, 1988, Donald and Patricia Crossley attempted to revoke their assignment to the Liberty Bank & Trust. On September 20, 1988, Donald and Patricia executed a quit claim deed to Ballard.

On October 20, 1988, Liberty Bank & Trust filed a petition seeking to foreclose upon the real estate. Larry Crossley, Patricia Crossley, and Donald Crossley were all

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[4] The findings of fact include findings made by Judge O'Brien in *Crossley I* in his order granting Defendants' motions to dismiss. These findings also include facts drawn from the exhibits attached to the Complaint. The court notes that none of the parties have submitted a statement of material facts as to which the [sic] there is a genuine issue to be tried. Furthermore, the parties do not dispute any of the exhibits attached to the Complaint, or the facts contained in those exhibits. The court, therefore, finds that there are no genuine issues of fact with respect to the exhibits attached to the Complaint nor the facts contained in those exhibits.

[5] Defendant Liberty Bank & Trust was formerly known as the Forest City Bank and Trust Company.

named as Defendants in the foreclosure suit. The Crossley's brought counterclaims based on fraud and breach of contract. The counterclaims were denied and judgment was entered for Liberty Bank & Trust on May 13, 1991.[6] In the decree of foreclosure, the Iowa district court declared that:

> 2. The Plaintiff's equitable mortgage as a lien is established as a lien against the real estate described above and is superior and paramount to the interest, liens and claims of the defendants, except to the extent of the vendor's interest in the real estate contract executed on March 23, 1973. The court need not decide in this proceeding whether Frances Ballard or Larry Crossley has legal or equitable title to the property, because that is not in issue in this foreclosure action. The vendor's interest in the property, whomever may later be determined to hold it, is superior to the interest foreclosed upon by the plaintiff.
>
> 3. . . . the plaintiff or whoever holds the certificate of purchase at the Sheriff's sale can satisfy the real estate contract underlying the equitable mortgage foreclosed on by plaintiff herein, by tendering the balance due on said contract, which is $95,230.00 . . . The Clerk of Court shall release said real estate proceeds to whomever Frances Ballard and Larry Crossley agree shall be the recipient of said funds or upon further order of whatever court, tribunal, or arbitration panel Frances Ballard or Larry Crossley agree upon to determine the issue of

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[6] The decree of foreclosure is attached to the Complaint as Exhibit "A."

> legal title. The determination of legal title as between Frances Ballard and Larry Crossley shall in no way affect or delay plaintiff's foreclosure of its equitable mortgage.

On Appeal, the Iowa Court of Appeals affirmed the district court. *See Liberty Bank & Trust v. Crossley*, No. 91-849 (Iowa Ct. App. Dec. 29, 1992).

Following the entry of the foreclosure decree an execution upon that judgment was issued on May 17, 1991 by the Sheriff of Winnebago County, Iowa. Liberty Bank & Trust purchased the property at a sheriff's sale on July 17, 1991, for $405,271.34. The property was subject to a six month redemption period.[7]

On February 21, 1992, Crossley filed a petition for declaratory judgment in Iowa District Court for Winnebago County, in which he requested that the sheriff's deed be set aside. The Iowa district court denied Crossley's claim and dismissed the petition. Crossley appealed, and on February 23, 1993, the Iowa Court of Appeals affirmed the decision of the Iowa District Court. *See Crossley v. Lilliquist*, No. 2-669/92-593 (Iowa Ct. App. Feb. 23, 1993).[8]

While Crossley was appealing the foreclosure, the real estate was placed in receivership and Defendant Hertz Management, Inc. ("Hertz") was appointed the receiver. In 1991, Hertz rented the property to Crossley.

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[7] A copy of the July 17, 1991, sheriff's certificate of purchase is attached to the Complaint as Exhibit "F".

[8] A copy of the Iowa Court of Appeals' decision is attached to Defendant Liberty Bank & Trust's Motion to Dismiss as Exhibit "A".

On January 21, 1992, Liberty Bank & Trust received a sheriff's deed to the property.[9] In 1992, Hertz did not rent the property to Crossley. Crossley received a notice to quit on March 13, 1992. On March 25, 1992, a forcible entry and detainer action was filed in Iowa small claims court. On April 16, 1992, judgment was entered against Crossley. Crossley posted an appeal bond and appealed the decision. On May 26, 1992, the Iowa District Court reversed, holding that Liberty Bank & Trust should have brought its action in Iowa District Court rather than small claims court. In its ruling, the Iowa District Court also held that: "By this ruling, the Court does not intimate that Larry Crossley had paramount title giving him a defense in the FED proceeding." Between March and May of 1992, Crossley planted crops on the property. On June 30, 1992, the Winnebago County Sheriff received directions from Liberty Bank & Trust's attorney to proceed with a writ of possession.[10] Crossley was evicted from the property on July 31, 1992.

In the fall of 1992, Liberty Bank & Trust had the crops on the property harvested and brought to Defendants Farmers Coop Association Forest City,[11] and Farmers

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[9] A copy of the sheriff's deed is attached to the Complaint as Exhibit "H".

[10] The directions are attached to the Complaint as Exhibit "J".

[11] Defendant Don Severson is the manager and Defendant Gary Sterling is the assistant manager of Defendant Farmers Coop Association Forest City.

Coop Elevator of Thompson Rake.[12] Crossley subsequently brought an action in the Iowa District Court concerning his claim, under the doctrine of emblements, for the proceeds of the sales of the crops grown during the 1992 season. On October 13, 1994, the Iowa District court rejected Crossley's claims.[13] The Iowa District Court held that:

> When defendant Larry Crossley planted his crop in May of 1992, he did not have a tenant relationship and, as a result, the doctrine of emblements is not applicable in the instant case. See *Hecht v. Dittman,* 7 N.W. 495, 56 Iowa 679; *Everingham v. Brayden,* 12 N.W.2d 142, 58 Iowa 133; *Goldstein v. Munden,* 210 N.W. 444, 202 Iowa 381. The doctrine of emblements pertains to planted crops prior to a termination of tenancy. See 21A A.Jur.2d, *Crops,* § 25.
>
> The court find that the defendant Larry Crossley had no right to plant the crop in May of 1992 and therefore has no right under the doctrine of emblements to the proceeds of the crop pursuant to the arguments submitted in defendant's motion.

*Liberty Bank and Trust v. Crossley,* No. 13978, at 3-4 (Iowa Dist. Ct. Oct. 13, 1993).

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[12] Defendant Ronald Pyle is the manager of Defendant Farmers Co-op Elevator of Thompson Rake.

[13] A copy of the Iowa District Court's decision in *Liberty Bank and Trust v. Crossley,* No. 13978 (Iowa Dist. Ct. Oct. 13, 1993), is attached to Defendant Liberty Bank & Trust's Motion to Dismiss as Exhibit "B".

Crossley also brought motions in that action to dismiss Liberty Bank & Trust's offer of first refusal. On October 1, 1993, the Iowa District Court denied those motions, holding that:

> The Court finds that the plaintiff has complied with the provisions of Section 654.16(a) and has provided the defendants with adequate notice as to the proposed sale as well as giving notice prior to the proper recording of the sheriff's deed and with the deed being submitted for filing in the proper form and substance.

*Id.* at 6 (Iowa Dist. Ct. Oct. 1, 1993).[14]

## *III. ANALYSIS*

### *A. Federal Rule of Civil Procedure 12(b)(6).*

In considering a motion to dismiss for failure to state a claim upon which relief can be granted, a court must accept as true the well-pleaded factual allegations contained in the complaint and view them, together with all reasonable inferences which may be drawn from them, in the light most favorable to the plaintiff. *See Patterson v. Von Riesen*, 999 F.2d 1235, 1237 (8th Cir. 1993); *McCormack v. Citibank, N.A.*, 979 F.2d 643, 646 (8th Cir. 1992); *Murphy v. Lancaster*, 960 F.2d 746, 748 (8th Cir. 1992); *see also Concerned Citizens v. Nuclear Regulatory Comm'n*, 970 F.2d 421, 425 (8th Cir. 1992); *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982); *Sladek v. Bell System Management Pension Plan*, 880 F.2d 972, 975 (7th Cir. 1989); *Ellsworth v. City*

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[14] A copy of the Iowa District Court's October 1, 1993, ruling is attached to the Complaint as Exhibit "P".

*of Racine*, 774 F.2d 182, 184 (7th Cir. 1985), *cert. denied*, 475 U.S. 1047 (1986). A dismissal should be granted only if the plaintiff can prove no set of facts that would entitle the plaintiff to relief. *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957); *see McCormack*, 979 F.2d at 646; *Murphy*, 960 F.2d at 748; *see also Dicken v. Ashcroft*, 972 F.2d 231 (8th Cir. 1992).

### *B. Standard for Summary Judgment*

The Eighth Circuit recognizes "that summary judgment is a drastic remedy and must be exercised with extreme care to prevent taking genuine issues of fact away from juries." *Wabun-Inini v. Sessions*, 900 F.2d 1234, 1238 (8th Cir. 1990). On the other hand, the Federal Rules of Civil Procedure have authorized for nearly 60 years "motions for summary judgment upon proper showings of the lack of a genuine, triable issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986). Thus, "summary judgment procedure is properly regarded not as a disfavored procedural shortcut, but rather as an integral part of the Federal Rules as a whole, which are designed 'to secure the just, speedy and inexpensive determination of every action.' " *Wabun-Inini*, 900 F.2d at 1238 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 327 (1986)); *Hartnagel v. Norman*, 953 F.2d 394, 396 (8th Cir. 1992).

The standard for granting summary judgment is well established. *Rule* 56 of the Federal Rules of Civil Procedure states in pertinent part:

> Rule 56. Summary Judgment
>
> (b) For Defending Party. A part against whom a claim . . . is asserted . . . may, at any time, move for summary judgment in the party's favor as to all or any part thereof.
>
> (c) Motions and Proceedings Thereon. . . . *The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.*

Fed. R. Civ. P. 56(b) & (c) (emphasis added); *see also Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986); *Munz v. Michael*, 28 F.3d 795, 798 (8th Cir. 1994); *Roth v. U.S.S. Great Lakes Fleet, Inc.*, 25 F.3d 707, 708 (8th Cir. 1994); *Cole v. Bone*, 993 F.2d 1328, 1331 (8th Cir. 1993); *Woodsmith Publishing Co. v. Meredith Corp.*, 904 F.2d 1244, 1247 (8th Cir. 1990); *Wabun-Inini*, 900 F.2d at 1238 (citing *Fed. R. Civ. P.* 56(c)).[15] A court considering a motion for summary judgment must view all the facts in the light most favorable to the nonmoving party, here Crossley, and give Crossley the benefit of all reasonable inferences that can be drawn from the facts. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (quoting *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962));

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[15] An issue of material fact is genuine if it has a real basis in the record. *Hartnagel v. Norman*, 953 F.2d 394 (8th Cir. 1992) (citing *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986)). "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Hartnagel*, 953 F.2d at 394.

*Munz v. Michael*, 28 F.3d 795, 796 (8th Cir. 1994); *Allison v. Flexway Trucking, Inc.*, 28 F.3d 64, 66 (8th Cir. 1994); *Johnson v. Group Health Plan, Inc.*, 994 F.2d 543, 545 (8th Cir. 1993); *Burk v. Beene*, 948 F.2d 489, 492 (8th Cir. 1991); *Coday v. City of Springfield*, 939 F.2d 666, 667 (8th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S. Ct. 1170 (1992).

Procedurally, the moving parties, bear "the initial responsibility of informing the district court of the basis for their motion and identifying those portions of the record which show lack of a genuine issue." *Hartnagel*, 953 F.2d at 395 (citing *Celotex*, 477 U.S. at 323); *see also Reed v. Woodruff County, Ark.*, 7 F.3d 808, 810 (8th Cir. 1993). The moving parties are not required by Rule 56 to support their motion with affidavits or other similar materials negating the opponent's claim. *Id.*

"When a moving party has carried its burden under Rule 56(c), its opponent must do more than simply show there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. Crossley is required under Rule 56(e) to go beyond the pleadings, and by affidavits, or by the "depositions, answers to interrogatories, and admissions on file," designate "specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e); *Celotex*, 477 U.S. at 324. Although "direct proof is not required to create a jury question, . . . to avoid summary judgment, 'the facts and circumstances relied upon must attain the dignity of substantial evidence and must not be such as merely to create a suspicion.' " *Metge v. Baehler*, 762 F.2d 621, 625 (8th Cir. 1985) (quoting *Impro Products, Inc. v. Herrick*, 715 F.2d 1267, 1272 (8th Cir. 1983), *cert. denied*, 465 U.S. 1026 (1984)), *cert. denied*, 474 U.S. 1057 (1986). The necessary proof that the

nonmoving party must produce is not precisely measurable, but the evidence must be "such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986); *Allison v. Flexway Trucking, Inc.*, 28 F.3d 64, 66 (8th Cir. 1994).

In *Anderson*, 477 U.S. at 249, *Celotex*, 477 U.S. at 323-24, and *Matsushita*, 475 U.S. at 586-87, the Supreme Court established that a summary judgment motion should be interpreted by the trial court to accomplish its purpose of disposing of factually unsupported claims, and the trial judge's function is not to weigh the evidence and determine the truth of the matter, but to determine whether there is a genuine issue for trial. *Johnson v. Enron Corp.*, 906 F.2d 1234, 1237 (8th Cir. 1990). The trial court, therefore, must "assess the adequacy of the nonmovants' response and whether that showing, on admissible evidence, would be sufficient to carry the burden of proof at trial." *Hartnagel*, 953 F.2d at 396 (citing *Celotex*, 477 U.S. at 322). If the nonmoving party fails to make a sufficient showing of an essential element of a claim with respect to which he has the burden of proof, then the moving parties are "entitled to judgment as a matter of law." *Celotex*, 477 U.S. at 323; *Woodsmith*, 904 F.2d at 1247. However, if the court can conclude that a reasonable trier of fact could return a verdict for the nonmovant, then summary judgment should not be granted. *Anderson*, 477 U.S. at 248; *Burk*, 948 F.2d at 492; *Woodsmith*, 904 F.2d at 1247. With these standards in mind, the court turns to consideration of the Defendants' motions for summary judgment.

### *C. Liberty Bank & Trust's Motion to Dismiss*

The gist of Liberty Bank & Trust's Motion to Dismiss, which the court shall treat as a motion for summary judgment, is that Crossley's complaint in this case raises no issues which were not previously decided either in *Crossley I* or the Iowa state courts. The court concludes that Defendant Liberty Bank & Trust is arguing that Crossley's claims are barred by res judicata.[16] The court agrees with this assessment.

Res judicata, or claim preclusion, applies if three requirements are met: "(1) the prior judgment was rendered by a court of competent jurisdiction, (2) the prior judgment was a final judgment on the merits, and (3) the same cause of action and the same parties or their privies were involved in both cases." *White v. Kelsey*, 935 F.2d 968, 969 (8th Cir. 1991); *see Murphy v. Jones*, 877 F.2d 682, 684 (8th Cir. 1989); *Headley v. Bacon*, 828 F.2d 1272, 1274 (8th Cir. 1987).[17] As the Eight [sic] Circuit has pointed out:

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[16] The court notes that Defendant Liberty Bank & Trust's Motion to Dismiss does not use the term "res judicata." Nonetheless, it is clear from the language used in the motion that this is the doctrine being asserted by Defendant Liberty Bank & Trust. For example, in paragraph 12 of the motion to dismiss, it is asserted that "[a]ll issues in Larry Crossley's Complaint have been previously determined in the Iowa Courts as well as this Court."

[17] In regard to Crossley's pendent state law claims, res judicata is an issue of substantive law requiring the application of the law of the forum state. *Kuehn v. Garcia*, 608 F.2d 1143, 1147 (8th Cir. 1979), *cert. denied*, 445 U.S. 943 (1980). This court, therefore, is required to give preclusive effect to state court judgments whenever the courts of the state would do so. *See*

> The doctrines of res judicata and collateral estoppel serve to protect the finality of judgments. The doctrines are borne of the recognition that "endless litigation leads to chaos; that certainty in legal relations must be maintained; and that after a party has had his day in court, justice, expediency and preservation of the public tranquility requires that the matter be at an end."

*Smith v. Updegraff*, 744 F.2d 1354, 1362 (8th Cir. 1984) (quoting *Schroeder v. 171.74 Acres of Land*, 318 F.2d 311, 314 (8th Cir. 1968)).

The first two requirements are clearly satisfied here, leaving only the third requirement. In determining whether claims arise from the same cause of action, the Eighth Circuit has indicated that

> We have adopted the position of the Restatement (Second) of Judgments in determining whether two separately asserted claims arise from the same cause of action for res judicata purposes:

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*Newman Signs, Inc. v. Sinner*, 796 F.2d 247, 249 (8th Cir. 1986); *see also Allen v. McCurry*, 449 U.S. 90, 96 (1980). "Under Iowa law res judicata, or claim preclusion, bars relitigation of the same claim between parties or their privies where a final judgment has been rendered upon the merits by a court of competent jurisdiction." *Smith v. Updegraff*, 744 F.2d 1354, 1362 (8th Cir. 1984) (citing *National Farmers Union Property & Casualty Co. v. Nelson*, 260 Iowa 163, 147 N.W.2d 839 (1967)). The doctrine of claim preclusion, as applied in Iowa, is therefore applicable under the circumstances of this case. *See generally Brown v. Monticello State Bank*, 360 N.W.2d 81, 84 (Iowa 1984); *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981).

> " 'When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar . . . the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose' ".

*Poe v. John Deere Co.*, 695 F.2d 1103, 1106 (8th Cir. 1982) (quoting Restatement (Second) of Judgments § 24(1) (1982)). What constitutes a "transaction" or "series of connected transactions" is

> " 'to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage' ".

*Poe*, supra, 695 F.2d at 1106 (quoting Restatement (Second) of Judgments § 24(2) (1982)). Put another way, whether two claims are the same for res judicata purposes depends on whether the claims arise out of the same nucleus of operative fact or are based upon the same factual predicate.

*Murphy*, 877 F.2d at 684-85.

In the prior state court proceedings, and in *Crossley I*, Crossley raised challenges to the propriety of the foreclosure proceedings, the sheriff's sale, the sale of the crops from the 1992 season, and the notice of first refusal. This series of legal actions, which all concerned the events surrounding the foreclosure of the real estate in question, are the same actions which Crossley challenges

in this case. The court has little difficulty concluding that the claims asserted by Crossley involve "the same nucleus of operative fact" previously litigated in *Crossley I* and the Iowa state courts. Therefore, the court finds that Crossley's claims against Defendant Liberty Bank & Trust are barred by operation of res judicata, and the court shall grant Defendant Liberty Bank & Trust's motion for summary judgment.

***D. Hertz and Loos' Motion to Dismiss.***

Defendants Hertz and Loos have incorporated the arguments raised by Defendant Liberty Bank & Trust in their motion to dismiss. Crossley's claims against Defendants Hertz and Loos concern the propriety of the sale of the crops for the 1992 season. For the reasons detailed above, the court concludes that Crossley's claims concerning the sale of the 1992 crops are barred by the doctrine of collateral estoppel or issue preclusion.

> Under Iowa law collateral estoppel, or issue preclusion, applies only where four requirements are met: (1) the issue concluded must be identical, (2) the issue must have been raised and litigated in the prior action, (3) the issue must have been material and relevant to the disposition of the prior action, and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

*Smith*, 744 F.2d at 1362 (citing *Mauer v. Rohde*, 257 N.W.2d 489, 497 (Iowa 1977)); *see also Selchert v. State*, 420 N.W.2d 816, 818 (Iowa 1988).

Central to Crossley's claim against Defendants Hertz and Loos is the issue of his right to the proceeds for the 1992 season. Application of the collateral estoppel test here clearly indicates that Crossley is barred from relitigating this issue in this forum. The issue of Crossley's interest in the 1992 season was at the center of the Iowa District Court's order of October 13, 1993, in *Liberty Bank and Trust v. Crossley*, No. 13978 (Iowa Dist. Ct. Oct. 13, 1993). That issue was resolved against Crossley in that action. *See id.* at 3. Therefore, the court concludes that Crossley is collaterally estopped from asserting his claims against Defendants Hertz and Loos. Defendants Hertz and Loos' motion for summary judgment is granted.

### *E. Farmers Co-op Elevator and Farmers Coop Association's Motions to Dismiss.*[18]

Both motions to dismiss raise identical defenses grounded on the Uniform Commercial Code, namely that they were good faith purchasers for value.

Article 2 of the Uniform Commercial Code applies to "transactions in goods." Iowa Code § 554.2102. The definition of "goods" is found in 554.2105(1):

> "Goods" means all things (including specially manufactured goods) which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action. "Goods" also includes the

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[18] Defendant Farmers Co-op Elevator's Motion to Dismiss is identical in all respects to the motion to dismiss filed by Defendant Farmers Coop Association.

> unborn young of animals and growing crops and other identified things attached to realty as described in the section on goods to be severed from realty (Section 554.2107).

Iowa Code § 554.2403 provides that "[a] purchaser of goods acquires all title which the purchaser's transferor had or had power to transfer. . . . A person with voidable title has power to transfer a good title to a good faith purchaser for value." As the Third Circuit has explained:

> The good-faith purchaser exception developed over time in order to promote finality in commercial transactions and thus to encourage purchases and to foster commerce. It does so by protecting the title of a purchaser who acquires property for valuable consideration and who, at the time of the purchase, is without notice that the seller lacks valid and transferable title in the property.

*United States v. Lavin*, 942 F.2d 177, 186 (3rd Cir. 1991). In *Johnson & Johnson Products, Inc. v. Dal Int'l Trading Co.*, 798 F.2d 100 (3d Cir. 1986), the Third Circuit described the purpose of the good faith purchaser exception:

> The purpose of the good faith purchaser doctrine, codified in Sections 2-403 and 2-102 of the UCC, is to promote commerce by reducing transaction costs; it allows people safely to engage in the purchase and sale of goods without conducting a costly investigation of the conduct and rights of all previous possessors in the chain of distribution.

*Id.* at 104.

At the time the sales of the 1992 crop occurred, Liberty Bank & Trust held a sheriff's deed to the real

estate. Even were the court to assume that, at the time the crops were sold to the Defendant elevators, Liberty Bank & Trust only had a voidable title to the crops, the court concludes that from the allegations contained in the Complaint and the facts drawn from the attachments to the Complaint, the record establishes that Defendant elevators were good faith purchasers for value at the time they purchased the grain. To act in good faith under article 2 of the U.C.C., a party must exhibit honesty in fact and fair dealing. *See* Iowa Code 554.2103(1)(b). There are no allegations in the Complaint that Defendant elevators acted in a dishonest or unfair manner at the time the sales were made. Although Crossley alleges in the Complaint that he told the Defendants that he considered the crops to be his personal property, the Complaint fails to state that this disclosure occurred prior to the sales. Even if the court assumes that the elevators were aware of the dispute over the property, under the circumstances of this case, the court concludes that Defendant elevators were not required to investigate the current status of Liberty Bank & Trust's interests in the crops. *See Johnson & Johnson Products, Inc.*, 798 F.2d at 104; *Robison v. Gerber Products Co.*, 765 F.2d 431, 433 (4th Cir. 1985). Thus, because Defendants were good faith purchasers of the crops, Crossley is precluded from recovering against them, and the court shall grant Defendants Farmers Co-op Elevator and Farmers Coop Associations' respective motions to dismiss.

## *IV. CONCLUSION*

For the reasons set forth above, the court grants the following motions: (1) Defendants Farmers Co-op Elevator of Thompson-Rake, Ronald G. Pyle, and Donald Penning's Motion to Dismiss; (2) Defendants Liberty Bank & Trust and Thomas Hromatka's Motion to Dismiss; (3) Defendants Farmers Coop Association of Forest City, Don Severson, and Gary Sterling's Motion to Dismiss; and (4) Defendant Hertz Farm Management, Inc. and Gary Loos as receiver's Motion to Dismiss Hertz Farm Management, Inc. and Gary Loos. Having granted all of Defendants' respective motions to dismiss, the court orders that Plaintiff's complaint be dismissed with prejudice.[19]

**IT IS SO ORDERED.**

**DATED** this 27th day of October, 1994.

/s/ Mark W. Bennett
MARK W. BENNETT
U.S. DISTRICT COURT
JUDGE

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[19] The court shall deny Defendants Farmers Coop Association of Forest City, Don Severson and Gary Sterling's Rule 11 Motion for Sanctions (#33) and Defendants Farmers Co-op Elevator of Thompson-Rake, Ronald G. Pyle and Ronald Penning's Rule 11 Motion for Sanctions (#27). Plaintiff has proceeded pro se in this matter which concerns complex questions of commercial, financial and procedural law. A further consideration in denying Defendants' respective motions for sanctions is the fact that Plaintiff was invited by the court to file another case in this court once his state litigation was completed.

## APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

| | | |
|---|---|---|
| LARRY CROSSLEY,<br><br>Plaintiff,<br><br>vs.<br><br>LIBERTY BANK & TRUST CO., THOMAS J. HROMATKA, C.E.O., HERTZ MANAGEMENT INC., GARY LOOS AS RECEIVER, FARMERS COOP ASSOCIATION FOREST CITY, FARMERS CO-OP ELEVATOR CO. THOMPSON, FARMERS CO-OP ELEVATOR CO. LELAND, DON SEVERSON, GARY STERLING, RONALD G. PYLE, RONALD PENNING AND YET TO BE NAMED JOHN DOES<br><br>Defendants. | : | NO. C93-3083<br><br>**ORDER REGARDING MOTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 52(B) AND 59**<br><br>(Filed Nov. 30, 1994) |

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This matter comes before the court on Plaintiff Larry Crossley's Motion to Court Pursuant to F.R.C.P., Rules 52(b) and Rule 59 with Motion, Brief and Affidavit in Support of (#45) filed November 4, 1994. Defendants Hertz Farm Management, Inc. and Gary Loos filed a timely resistance to the motion on November 7, 1994. In his motion, Crossley asserts that the court made factual

and legal errors in its order of October 27, 1994, granting Defendants' motion to dismiss.

*A. Applicability of Rules 52 and 59*

First, the court notes that under Federal Rule of Civil Procedure 59, the court has authority to reconsider its prior ruling here. *See, e.g., Kort v. Western Surety Co.*, 705 F.2d 278, 280-81 (8th Cir. 1983) (upholding trial court's power, under Rule 59(e), to rescind prior grant of summary judgment). Therefore, the court will consider the merits of Crossley's motion.

*B. Merits of Motion*

Considering Crossley's motion as one properly brought as a motion to reconsider, the court will consider the merits of the issues raised in the motion.

*1. Conversion of Defendants' Motions.* Crossley asserts that the court erred in converting Defendants Hertz and Liberty Bank & Trust's respective 12(b)(6) motions into motions for summary judgment without first giving him notice of this fact. As the court noted in its decision, the two 12(b)(6) motions were converted to motions for summary judgment when the court considered matters outside the pleadings. In this instance, it was two Iowa state court decisions which were attached to the two defendants' respective motions. The fact that matters outside the pleadings had been submitted in support of Defendants' motions could hardly have come as a surprise to Crossley. Furthermore, given the fact that in his resistance to Defendants' motions Crossley submitted matters outside the pleadings, the court was well

founded in its assumption that Crossley was treating all Defendants' motions as motions for summary judgment. Finally, given his submission of materials outside the pleadings in support of his resistance, Crossley does not state what further materials he would have submitted in support of his motion if the court had provided him with explicit notice that it was converting Defendants' motions.

Nevertheless, the Eighth Circuit has pointed out that:

> the procedural requirements of Rule 56 are to be strictly adhered to. *Ailshire v. Darnell*, 508 F.2d 526, 528 (8th Cir. 1974). That rule provides that a motion for summary judgment "shall be served at least 10 days before the time fixed for the hearing." Fed.R.Civ.P. 56(c). The purpose of this notice provision is to allow the opposing party a meaningful opportunity to resist the motion by submitting counteraffidavits. Therefore, the required notice cannot be dispensed with merely because a motion to dismiss is treated as a motion for summary judgment by the district court, and this is true even though more than 10 days have elapsed between the filing of the motion and the entry of the order of dismissal.

*Winfrey v. Brewer*, 570 F.2d 761, 764 (8th Cir. 1978); *see also Williams v. City of St. Louis*, 783 F.2d 114, 116 (8th Cir. 1986); *Jensen v. Klecker*, 599 F.2d 243, 245 (8th Cir. 1979); *Ailshire v. Darnell*, 508 F.2d 526, 527-28 (8th Cir. 1974); *Scott v. Courtesy Inns, Inc.*, 472 F.2d 563, 564 (5th Cir. 1973).

Here, the court concludes that it did not provide Crossley with sufficient notice that it was going to consider Defendants Hertz Management, Inc. and Liberty

Bank and Trust's respective motions to dismiss as motions for summary judgment. Therefore, the court shall permit Crossley and Defendants Hertz Management, Inc., Gary Loos, Liberty Bank & Trust Co., and Thomas J. Hromatka 10 days in which to file such documents and materials permitted under Federal Rule of Civil Procedure 56 and any supplemental briefs these parties desire to file on the issues raised by Defendants' respective motions for summary judgment. Once these materials are filed, the court will then reconsider its order granting summary judgment for these Defendants.

2. ***Motion with Respect to the Other Defendants.*** Although the court will reconsider its decision to grant summary judgment, upon review of the other contentions raised by Crossley in his motion, the court finds no merit in these other issues raised in his motion. The court will briefly touch upon several points raised in the motion.

***a. A Hearing on the Motions.*** Closely tied to the notice issue, Crossley further asserts that the court should not have ruled on the motions without first holding a hearing. It must be noted that none of the parties requested a hearing, and given the state of the record, the court was of the belief that none was necessary for proper disposition of the motions.

Federal Rule of Civil Procedure 78 provides in pertinent part:

> To expedite its business, the court may make provision by rule or order for the submission and determination of motions without oral hearing upon brief written statements of reasons in support and opposition.

Local Rule 14(c) provides that:

> Motions shall be submitted and determined upon the papers hereinafter provided. Oral argument of motions may be had on the court's own motion or on the written request and showing of cause by any party and upon order of the court. Such request shall be separately stated at the conclusion of the motion or memorandum and shall be noted in the caption.

The Eighth Circuit has upheld similar rules. *See Parish v. Howard*, 459 F.2d 616, 620 (8th Cir. 1972). Therefore, the court finds that the mere fact that it decided the motions without first holding a hearing on the motions provides no basis for relief from the court's previous order.

*b. Notice of Motion.* Crossley asserts that the court erred in ruling on the motions to dismiss to quickly following Defendant Hertz's attorney's submission of an affidavit in which he lays a foundation for one of the two Iowa court cases submitted with the motion to dismiss. The affidavit and attachments were served on Crossley on October 21, 1994, and the court ruled on the Defendants' motion on October 27, 1994. The court, however, did not consider any matters raised in the affidavit and makes no reference to it in its decision. Furthermore, Crossley again fails to state what, if any, materials he would have filed in response to the affidavit.

*c. Factual Findings of the Court.* Crossley also takes issue with a number of statements in the opinion. As an example, Crossley asserts in paragraph 6 that:

> 6. This Court is in error on page 14 of order, "Plaintiff did *not* in CROSSLEY I, challenge the sale of crops, or notice of first refusal, or Defendant Bank's possession of homestead. These events had not happened at the time of CROSSLEY I took place.

The court, however, never made such a statement. What the court did state was:

> *In the prior state court proceedings*, and in *Crossley I*, Crossley raised challenges to the propriety of the foreclosure proceedings, the sheriff's sale, the sale of the crops from the 1992 season, and the notice of first refusal.

*Crossley v. Liberty Bank & Trust Co.*, No. C93-3083, at 14 (S.D. Iowa Oct. 27, 1994) (emphasis added). Although the language might possibly be interpreted by the reader to conclude that Crossley raised the same issues in the state court proceedings as he raised in *Crossley I*, the language was only intended to set forth the type of claims Crossley had raised in either his previous state court proceedings or in *Crossley I*. The court finds no error in this or any of the other factual contentions raised by Crossley.

***d. Other Assertions.*** The court has considered all of Crossley's other assertions and finds them to be without merit.

### *C. Conclusion*

The court will grant Crossley's motion in so far as it will reconsider its prior ruling granting the Defendants' respective motions for summary judgment. Crossley and Defendants Hertz Management, Inc., Gary Loos, Thomas

J. Hromatka and Liberty Bank & Trust Co. shall have 10 days in which to supplement the record if they so desire, including the filing of supplemental briefs on the issues raised by Defendants' respective motions for summary judgment.

With respect to the other Defendants, having found no basis for the court to modify or amend its prior ruling in this matter, the court shall deny Crossley's motion as to these Defendants' respective motions to dismiss.

**IT IS SO ORDERED.**

**DATED** this 30th day of November, 1994.

/s/ Mark W. Bennett
MARK W. BENNETT
UNITED STATES DISTRICT JUDGE

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

| | |
|---|---|
| LARRY CROSSLEY,<br><br>Plaintiff,<br><br>vs.<br><br>LIBERTY BANK AND TRUST CO., THOMAS J. HROMATKA, C.E.O., HERTZ MANAGEMENT INC., GARY LOOS AS RECEIVER, FARMERS COOP ASSOCIATION FOREST CITY, FARMERS CO-OP ELEVATOR CO. THOMPSON, FARMERS CO-OP ELEVATOR CO. LELAND, DON SEVERSON, GARY STERLING, RONALD G. PYLE, RONALD PENNING AND YET TO BE NAMED JOHN DOES<br><br>Defendants. | NO. C93-3083<br><br>**ORDER DENYING MOTION UNDER FEDERAL RULE OF CIVIL PROCEDURE 52(B) AND 59**<br><br>(Filed Jan. 5, 1995) |

---

This matter comes before the court on Plaintiff Larry Crossley's Motion to Court Pursuant to F.R.C.P., Rules 52(b) and Rule 59 with Motion, Brief and Affidavit in Support of (#45) filed November 4, 1994. Defendants Hertz Farm Management, Inc. and Gary Loos filed a timely resistance to the motion on November 7, 1994, and December 14, 1994. In his motion, Crossley asserts that the court made factual and legal errors in its order of

October 27, 1994, granting Defendants' motions to dismiss. On November 30, 1994, the court entered an order on Crossley's motion in which the court indicated that it would reconsider it [sic] prior ruling granting Defendants' Hertz Farm Management, Inc. and Gary Loos ("Hertz"), and Liberty Bank & Trust Co.'s respective 12(b)(6) motions, which the court had covered into motions for summary judgment, on the grounds that it had converted and considered the 12(b)(6) motions into motions for summary judgment without first giving Crossley notice of this fact. A telephonic hearing on Crossley's motion was held on December 22, 1994. Plaintiff appeared pro se. Defendant Hertz was represented by Hayward L. Draper and Defendant Liberty Bank & Trust Co. was represented by Robert P. Cooper.[1]

The court converted Defendants' respective 12(b)(6) motions to dismiss into motions for summary judgment because the court took into account not only the allegations of the complaint, but also certain facts set out in public documents Defendants had attached to their motions. Such consideration or records and documents not attached to the complaint, or not expressly incorporated therein, is typically forbidden, unless the proceeding is properly converted into one for summary judgment under Rule 56. *See* Fed.R.Civ.P. 12(b)(6). "However, courts have made narrow exceptions for documents, the authenticity of which are not disputed by the parties; for official

---

[1] The parties are to be commended for their presentation of this matter. Crossley's *pro se* presentation was well prepared and he conducted himself in a competent and professional manner.

public records; for documents central to plaintiffs' claim; or for documents sufficiently referred to in the complaint." *Watterson v. Page*, 987 F.2d 1, 3 (1st Cir. 1993); *see Henson v. CSC Credit Serv.*, 29 F.3d 280, 284 (7th Cir. 1994); *Pension Benefit Guar. Corp. v. White Consol. Indus., Inc.*, 998 F.2d 1192, 1196 (3d Cir. 1993), *cert. denied*, 114 S. Ct. 687 (1994); *Allen v. Westpoint-Pepperell, Inc.*, 945 F.2d 40, 44 (2d Cir. 1991); *United States v. Wood*, 925 F.2d 1580, 1582 (7th Cir. 1991); *Chester County Intermediate Unit v. Pennsylvania Blue Shield*, 896 F.2d 808, 812 (3rd Cir. 1990); *Emrich v. Touche Ross & Co.*, 846 F.2d 1190, 1198 (9th Cir. 1988); *Mir v. Little Co. of Mary Hosp.*, 844 F.2d 646, 649 (9th Cir. 1988); *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986); *Mack v. South Bay Beer Distrib., Inc.*, 798 F.2d 1279, 1282 (9th Cir. 1986), *overruled on other grounds by Astoria Fed. Sav. and Loan Assoc. v. Solimino*, 501 U.S. 104 (1991); *see also Romani v. Shearson Lehman Hutton*, 929 F.2d 875, 879 n. 3 (1st Cir. 1991); *Fudge v. Penthouse Int'l, Ltd.*, 840 F.2d 1012, 1014-15 (1st Cir.), *cert. denied*, 488 U.S. 821 (1988); *In re Wade*, 969 F.2d 241, 249 & n. 12 (7th Cir. 1992). *See generally* 5A C. Wright and A. Miller, *Federal Practice and Procedure* § 1357 (1990) ("In determining whether to grant a Rule 12(b)(6) motion, the court primarily considers the allegations in the complaint, although matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint, also may be taken into account.").

Accordingly, the court's decision of October 27, 1994, to convert Defendants' respective motions to dismiss to motions for summary judgment was unnecessary since the two state court documents were matters of public record which the court was free to consider in deciding

Defendants' motions. Thus, because summary judgment was not in fact involved, the court did not error in not fully complying with Rule 56's notice requirements. *See Mack*, 798 F.2d at 1282.

Even if the exception noted above is inapplicable in this case and the court was required to consider Hertz's and Liberty Bank and Trust Co.'s motions to dismiss as motions for summary judgment, the court has now provided the parties with the opportunity to supplement the record and be heard on those motions. Upon consideration of the merits of the parties' arguments, including those found in the parties' supplemental materials, the court has reconsidered its decision to grant summary judgement. The court concludes, however, that having found no basis upon which to modify or amend its prior decision to grant Defendants' respective motions for summary judgment, the court shall deny Crossley's motion with respect to these Defendants' motions for summary judgment.

The court, therefore, concludes, because no error was committed by it in ruling on Defendants' motions to dismiss, that Crossley's Motion to Court Pursuant to F.R.C.P., Rules 52(b) and Rule 59 with Motion, Brief and Affidavit in Support of (#45) is **DENIED.**

**IT IS SO ORDERED.**

**DATED** this 5th day of January, 1995.

/s/ Mark W. Bennett
MARK W. BENNETT
UNITED STATES
DISTRICT JUDGE

Copies mailed on JAN 5 1995 to counsel of record or pro se parties as shown on the docket sheet.

/s/ G. Bohlke
Deputy Clerk

**APPENDIX D**

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

| | |
|---|---|
| LARRY CROSSLEY,<br><br>Plaintiff,<br><br>v.<br><br>LIBERTY BANK & TRUST CO., THOMAS J. HROMATKA, C.E.O., HERTZ FARM MANAGEMENT INC., GARY LOOS AS RECEIVER, FARMERS COOP ASSOCIATION FOREST CITY, FARMERS CO-OP ELEVATOR CO. THOMPSON FARMERS CO-OP ELEVATOR CO. LELAND, DON SEVERSON, GARY STERLING, RONALD G. PYLE, RONALD PENNING, AND YET TO BE NAMED JOHN DOES,<br><br>Defendants. | CIVIL. NO. C 93-3083<br><br>AFFIDAVIT FOR PURPOSES OF JUDICIAL NOTICE IN SUPPORT OF MOTION TO DISMISS HERTZ FARM MANAGEMENT, INC. AND GARY LOOS AS RECEIVER |

NOW COMES Hayward L. Draper, for purposes of providing a record for the Court regarding certain filings

previously made in the Iowa District Court for Winnebago County and within the judicial notice of this Court, and states as follows:

1. I am an attorney of record for Defendants Hertz Farm Management, Inc. and Gary Loos as receiver. In this capacity, I filed a Motion to Dismiss on behalf of these Defendants on October 3, 1994.

2. On April 20, 1993, the Iowa District Court for Winnebago County entered an Order which concluded with the following language: "the receiver is hereby discharged upon the payment of the entire balance of the receivership to the Defendants, Donald A. Crossley and Patricia Crossley."

3. On May 28, 1993, the receiver filed with the Court a copy of correspondence showing that all funds remaining in the receivership account had been paid over to Donald A. Crossley and Patricia Crossley as the Court had ordered, thereby closing the bank account that was the only thing left in the receivership. A copy of this last filing is attached hereto.

4. Plaintiff Larry Crossley had previously filed in the Iowa District Court for Winnebago County, on November 4, 1992, an objection to the Court reimbursing the receiver for any fees or expenses incurred after the sheriff's deed for the land in question had passed to the bank. Larry Crossley's own filing on this point stated as follows: "On January 21, 1992, the receiver's job was done and over, all they had to do was file their final reports."

5. Exhibit B to the Motion to Dismiss filed by Liberty Bank & Trust is a true and accurate copy of the Order

of the Iowa District Court for Winnebago County dated October 12, 1993, and holding that Plaintiff Larry Crossley had "no right to plant the crop in May of 1992 and therefore has no right under the doctrine of emblements to the proceeds of the crop. . . . "

I certify under penalty of perjury and pursuant to 28 U.S.C. § 1746 that the above facts are true and correct as I verily believe.

/s/ Hayward L. Draper
HAYWARD L. DRAPER
PK0007510
– of the firm of
NYEMASTER, GOODE,
McLAUGHLIN, VOIGTS,
WEST, HANSELL
& O'BRIEN, P.C.
1900 Hub Tower
699 Walnut Street
Des Moines, Iowa 50309
Telephone: (515) 283-3149
Fax: (515) 283-3108

PROOF OF SERVICE

The undersigned hereby certifies that a true copy of the foregoing instrument was served upon one of the attorneys of record for each party to the above-entitled cause by enclosing the same in an envelope addressed to each such attorney at his/her last known address as shown below, with postage fully paid, and by depositing

said envelope in a United States Post Office depository on the 21st of October, 1994:

/s/ Illegible

COPIES TO:

Larry Crossley
R.R. 1, Box 45
Carlos, Minnesota 56319

David J. Siegrist
94 Main Avenue North
Britt, Iowa 50423

Mark L. Zaiger
500 Firstar Bank Building
P.O. Box 2107
Cedar Rapids, Iowa 52406-2107

Robert P. Cooper
145 South Clark Street
P.O. Box 150
Forest City, Iowa 50436

Phil C. Redenbaugh
111 W. 6th Street
P.O. Box 1284
Storm Lake, Iowa 50588

[LOGO] Hertz

**Farm Management, Inc.**

**2800 4th St. S.W., Ste. 7, P.O. Box 1568**
**Mason City, Iowa 50402-1568**

May 20, 1993

Donald A. Crossley and Patricia Crossley
c/o Teresa Rogeness
101 Cresthaven Court
Forest City, IA 50436

RE: #1844 Crossley/Forest City
Winnebago County Equity No. 13978

Dear Mr. and Mrs. Crossley:

Enclosed with this letter is a check in the amount of $14,607.69 payable to Donald A. Crossley and Patricia Crossley. This check represents the disbursement of all funds retained in the above referenced receivership account as ordered in the Rulings filed in Winnebago County District Court on April 20, 1993. This account is now closed.

Sincerely,

HERTZ FARM MANAGEMENT, Inc.

/s/ Gary S. Loos
Gary S. Loos, AFM

GSL:mjh

Enclosure
cc: J. Mathew Anderson
LAIRD LAW FIRM
10 1st St. N.W.
Mason City, IA 50401

CERTIFIED MAIL

BEST AVAILABLE COPY

**CASHIER'S CHECK**

REMITTER Donald Crossley Receivership #1247

FOR _____

BOATMEN'S®

72-2176-739 72791

DATE MAY 20, 1993

PAY **FOURTEEN THOUSAND SIX HUNDRED**
**SEVEN DOLLARS AND SIXTY NINE CENTS**

$ ****14,607.69

TO THE ORDER OF Donald A and Patricia Crossley

BOATMEN'S BANK OF NORTH IOWA
25 WEST STATE • MASON CITY, IOWA 50401

By Stacey Abrahamson
AUTHORIZED SIGNATURE

⑈072791⑈ ⑆073921763⑆ 81 001 0⑈

App. 40

## APPENDIX E

### Exhibit "A"

IOWA DISTRICT COURT FOR WINNEBAGO COUNTY

| | | |
|---|---|---|
| LIBERTY BANK AND TRUST, Formerly Forest City Bank and Trust Company, Plaintiff, | ) | No. 13978 |
| vs. | ) | DECREE IN FORECLOSURE |
| DONALD A. CROSSLEY, PATRICIA CROSSLEY, LARRY A. CROSSLEY, and FRANCES BALLARD, Defendants. | ) | (Filed May 14, 1991) |

* * *

BE IT REMEMBERED that on the 11th day of July, 1990, the above-entitled matter came on for trial on the PETITION IN EQUITY filed by Liberty Bank and Trust on October 20, 1988. In its FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER filed on October 24, 1990, the court found that judgment should enter in favor of the plaintiff and against defendants Donald A. Crossley and Patricia Crossley. In addition, the court found that the assignment for security purposes executed by Donald A. Crossley and Patricia Crossley constituted an equitable mortgage which was subject to foreclosure.

DECREE

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED as follows:

1. Judgment is hereby entered in favor of the plaintiff, Liberty Bank and Trust, and against defendants Donald A. Crossley and Patricia Crossley, and against the following described real estate:

> The Northwest Quarter (NW¼), and the West Half (W½) of the Northeast Quarter (NE¼), all in Section Twenty-eight (28), Township Ninety-eight (98) North, Range Twenty-five (25), West of the 5th P.M., Winnebago County, Iowa, subject to public road and easements of record

in the amount of $332,324.78, plus interest at the rate provided in the promissory notes from and after July 19, 1990, reasonable attorney fees in the amount of $41,830, and abstracting expenses in the amount of $200.

2. The plaintiff's equitable mortgage is established as a lien against the real estate above described and is superior and paramount to the interest, liens and claims of the defendants, except to the extent of the vendor's interest in the real estate contract executed on March 23, 1973. The court need not decide in this proceeding whether Frances Ballard or Larry Crossley has legal or equitable title to the property, because that is not in issue in this foreclosure action. The vendor's interest in the property, whomever may later be determined to hold it, is superior to the interest foreclosed upon by the plaintiff.

3. The court further finds that because the question of who has legal title as between Frances Ballard and Larry Crossley is not necessary for this decree in foreclosure to be complete, until that issue is resolved in a proper forum, the plaintiff or whoever holds the certificate of purchase at the Sheriff's sale can satisfy the real

estate contract underlying the equitable mortgage foreclosed on by plaintiff herein, by tendering the balance due on said contract, which is $95,230.00, plus interest at the rate of $26.09 per day, from and after April 1, 1990, to the Clerk of Court and that upon the filing of an affidavit by the Clerk of Court acknowledging said payment, this decree shall serve as a conveyance to, shall quiet title to and shall merge both legal and equitable title to the above described real estate in the party who tendered such payment holding the certificate of purchase at the Sheriff's sale. The Clerk of Court shall release said real estate contract proceeds to whomever Frances Ballard and Larry Crossley agree shall be the recipient of said funds or upon further order of whatever court, tribunal, or arbitration panel Frances Ballard or Larry Crossley agree upon to determine the issue of legal title. The determination of legal title as between Frances Ballard and Larry Crossley shall in no way affect or delay plaintiff's foreclosure of its equitable mortgage.

4. Special execution may issue for the sale of the mortgaged real estate or so much thereof as is necessary to satisfy plaintiff's judgment, together with interest, costs including attorneys fees and accruing costs, to satisfy the judgment entered herein.

5. The period of redemption for the mortgaged real estate shall be set at six (6) months, plaintiff having waived any right to a deficiency judgment against the defendants which may arise out of this proceeding.

6. On expiration of the period of redemption for the mortgaged real estate, if possession be not immediately then surrender to the grantee of the Sheriff's deed to be

issued under said execution, a writ of possession shall be issued directing the Sheriff of this county to put such grantee in possession of the mortgaged premises.

7. In the event plaintiff is required to advance any further sum for taxes or insurance for the above described real estate, plaintiff be given an additional lien against the real estate for the amount so advanced, or priority equal to its mortgage lien.

Dated this 13th day of May, 1991.

COSTS: $305.70

/s/ Jon Stuart Scoles
Jon Stuart Scoles
Judge of the Second Judicial
District of Iowa

Clerk to provide copies
to counsel of record.

On same date as above file stamp,
a copy of this document was delivered
or mailed to ZUREK/illegible/
ALEXIS/STEENSLAND/BAPPE/
D&P CROSSLEY/L. CROSSLEY/BALLARD
Clerk District Court
above named County, Iowa
By _____

## APPENDIX F

**Exhibit "A"**

IN THE COURT OF APPEALS OF IOWA

No. 2-669 / 92-593

LARRY CROSSLEY,

Appellant,

vs.

THOMAS C. LILLQUIST, As Sheriff of Winnebago County, LIBERTY BANK & TRUST, and HERTZ FARM MANAGEMENT, INC.,

Appellees.

(Filed Feb. 23, 1993)

---

Appeal from the Iowa District Court for Winnebago County, John S. Mackey, Judge.

Plaintiff appeals from the district court's ruling in a declaratory judgment action. **AFFIRMED.**

Larry A. Crossley, Forest City, pro se, for appellant.

Richard L. Peterson, County Attorney, Forest City, for appellee Sheriff.

Mark L. McManigal of Shearer, Templer, Pingel & Kaplan, P.C., West Des Moines for appellee Bank.

J. Matthew Anderson of Laird, Heiny, McManigal, Winga, Duffy & Stambaugh, Mason City, for appellee Hertz.

Heard by Donielson, P.J., and Hayden, J., and Perkins, S.J.*

**PERKINS, S.J.**

Plaintiff Larry Crossley is the son of Donald and Patricia Crossley (the Crossleys). In 1973 the Crossleys purchased certain real estate in Winnebago County by contract from Frances Ballard. In 1985 the Crossleys borrowed money from the Forest City Bank & Trust Company, now known as Liberty Bank & Trust (the Bank). At the same time, the Crossleys assigned their interest in the property to the Bank as security. The assignment was recorded on April 16, 1985.

On October 31, 1986, Larry and Frances executed an assignment of contract in which Frances purportedly assigned her interest as contract vendor to Larry. The assignment provided:

> As consideration for such assignment Assignee shall by November 30, 1986, make all payments necessary to bring such Contract and Addendum to Contract current through such date. Assignee further agrees to timely make all payments to FRANCES BALLARD that are due and payable to her by DONALD A. CROSSLEY and PATRICIA CROSSLEY under the Contract and Addendum to Contract described above.
>
> Assignor reserves all rights and remedies, to include forfeiture and foreclosure, that were reserved to her in such Contract and Addendum to Contract and may exercise such rights and

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* Senior Judge from the 5th Judicial District serving on this court by order of the Iowa Supreme Court.

> remedies against the Buyers and/or Assignee if the Contract and/or Addendum to Contract are in default.

On September 7, 1988, Frances and Larry entered into an addendum to the assignment which specifically stated that Larry "shall be treated as the Buyer" of the property. In addition, the addendum released the Crossleys from any liability under the contract. On September 8, 1988, the Crossleys attempted to revoke their previous assignment to the Bank due to their claim they no longer had any interest in the property. The Crossleys also executed a quit claim deed to Frances.

In October 1988, the Bank filed a petition in equity seeking to recover on the Crossleys' unpaid promissory notes and to foreclose on the property. The Crossleys raised several counterclaims based on fraud and breach of contract. The district court denied the counterclaims and entered judgment in favor of the Bank. The Crossleys and Larry appealed, but did not file a supersedeas bond. The property was sold at a sheriff's sale to the Bank on July 17, 1991.

On appeal, we affirmed the district court. *Liberty Bank & Trust v. Crossley*, No. 91-849 (Iowa App. Dec. 29, 1992). We found the assignment by the Crossleys to the Bank created a valid equitable mortgage and that the Bank was entitled to foreclose upon the mortgage. We agreed with the district court's conclusion the Crossleys' counterclaims should be denied.

While the case was pending on appeal, the property was placed in receivership and Hertz Farm Management, Inc. was appointed as the receiver. Hertz rented the farm

to Larry in 1991, but decided not to rent to him in 1992. The Bank received a sheriff's deed to the property on January 21, 1992. Larry received a notice to quit on March 13, 1992.

On February 21, 1992, Larry filed a petition for declaratory judgment and for a temporary injunction naming the sheriff of Winnebago County, the Bank, and Hertz as defendants. Larry claimed that due to the assignment from Frances he was the owner of the farm. He asked that the sheriff's deed be set aside.

The Bank filed a motion to dismiss claiming that the petition was an improper collateral attack upon the earlier judgment of foreclosure. Hertz later joined this motion to dismiss. The district court found that even if Larry received a vendor's interest due to the assignment from Frances, he held only an interest in personal property, not real property. The court concluded Larry had no basis to challenge the validity of the sheriff's deed. The court therefore refused to render a declaratory judgment and dismissed the petition. Larry has appealed.

We review a declaratory judgment action as any other judgment. *Mead v. Iowa State Board of Parole,* 331 N.W.2d 102, 103 (Iowa 1983). When the case was tried in equity our review is de novo; when the case was tried at law our review is on error. *Id.* Larry's petition in this case sought an injunction and other equitable relief. We determine the present case was tried in equity and our review is de novo.

Larry contends the district court should have declared he was the owner of the real estate in question. He points out that the foreclosure judgment was only

against the Crossleys, and not him. He states that the foreclosure judgment did not address the question of what interest he had in the property. Larry again challenges the Bank's equitable mortgage, claiming that his interest in the property is superior to that of the Bank. He also claims the sheriff's deed is defective on its face.

A motion to dismiss admits all well-pleaded facts in a petition for the purpose of testing their legal sufficiency. *Wright v. Thompson,* 254 Iowa 342, 347, 117 N.W.2d 520, 523 (1962). A motion to dismiss is sustainable only when it appears to a certainty the pleader has failed to state a claim on which relief may be granted. *Ewurs v. Irving,* 344 N.W.2d 273, 275 (Iowa App. 1983). These principles apply to declaratory judgments as well as other actions. *Id.*

We determine Larry's petition is clearly a collateral attack upon the judgment of foreclosure. His petition challenges the validity of the Bank's equitable mortgage and the sheriff's deed to the Bank, issues which are properly part of the previous action. We also note Larry was a party to that case and raised several issues in appeal No. 91-849.

Generally, a decree or judgment cannot be attacked collaterally. *Morris Plan Co. v. Bruner,* 458 N.W.2d 853, 855 (Iowa App. 1990). A judgment which is void for lack of jurisdiction may be subject to collateral attack. *Id.* A judgment may also be subject to collateral attack when it is based upon extrinsic fraud. *Mauer v. Rohde,* 257 N.W.2d 489, 496 (Iowa 1977).

Larry has not claimed the court lacked jurisdiction to enter the judgment of foreclosure. He has also made no allegations of extrinsic fraud. Therefore, Larry has not

alleged any sufficient basis for making a collateral attack upon the judgment of foreclosure.

Moreover, even if the present action were not an improper collateral attack upon the judgment of foreclosure, Larry has failed to state a claim on which relief may be granted. In a contract for the purchase of real estate, the seller effectively divests herself of all interest in the property except the right to collect the purchase price. *Fellmer v. Gruber*, 261 N.W.2d 173, 174 (Iowa 1978). The seller's interest is considered to be personal property, not an interest in real property. *United Central Bank v. Kruse*, 439 N.W.2d 849, 853 (Iowa 1989). Thus, assuming the assignment placed Larry in the position of the contract vendor, Larry's interest is a personal property interest in the contract, not an interest in the real estate.

Larry raised a second issue in his appeal, but at oral argument the parties agreed this issue was moot. We therefore will not address it in our opinion.

We affirm the district court decision dismissing the petition for declaratory judgment. Costs of this appeal are assessed to Larry Crossley.

**AFFIRMED.**

## APPENDIX G

### Exhibit C

IN THE IOWA DISTRICT COURT FOR
WINNEBAGO COUNTY

| | | |
|---|---|---|
| LIBERTY BANK AND TRUST, FOREST CITY, IOWA, | ) | No. 13978 |
| Plaintiff, | ) | AMENDED RULING ON DEFENDANT LARRY CROSSLEY'S MOTION TO TURN OVER 1992 CROP |
| vs. | ) | |
| DONALD A. CROSSLEY, PATRICIA CROSSLEY, LARRY A. CROSSLEY and FRANCIS BALLARD, | ) | |
| Defendants. | ) | (Filed Oct. 13, 1993) |

Be It Remembered that on the 22nd day of September 1993, this matter came on before the Court. The Defendant Larry Crossley appeared pro se. The plaintiff was represented by Robert Cooper. Evidence was received and arguments were submitted, and the Court finds as follows:

The defendant Larry Crossley in his motion outlines a chronology of events which transpired from 1991 through 1992 regarding the subject property, which was foreclosed against his parents and codefendants, Donald and Patricia Crossley.

The pertinent facts within the instant case: On May 14, 1991, the Court entered a decree and foreclosure. In July of 1991, a Sheriff's sale was held, with the plaintiff

successfully bidding and receiving a certificate of purchase from the Sheriff.

During the 1991 crop year, the subject real estate had been placed in receivership and rented to Larry Crossley for the 1991 crop year only.

The receivership filed a notice of termination of tenancy, advising Mr. Crossley that his tenancy would come to an end before March 1, 1992.

In January of 1992, a Sheriff's deed was delivered to plaintiff.

On March 13, 1992, a notice to quit was served on the defendants, Donald, Patricia and Larry Crossley; and on March 25, 1992, a forceable entry and detainer action was filed in Winnebago County, Small Claims Court case No. 8-4997-0392.

On April 16, 1992, judgment was entered in favor of the plaintiff and against the Crossleys. Appeal bond was fixed in the amount of $2,000. Larry Crossley subsequently posted $2,000 appeal bond and appealed; and on May 26 the District Court reversed the Magistrate, finding that the plaintiff had failed to comply with the provisions of Section 648, *The Code*, by the plaintiff's failure to bring the action in District Court as opposed to Small Claims Court.

The Court in its ruling considered Larry Crossley as the lessee who was holding over after the termination of his lease. The Court also held: "By this ruling, the Court does not intimate the Larry Crossley had paramount title giving him a defense to the FED proceeding."

Defendant Larry Crossley in his motion maintains that from May 2 through May 7, 1991, that he planted a new crop and that subsequent thereto he was evicted by a writ of possession, and that now he lays claim to the 1992 crop under the doctrine of emblements.

Under the term "emblements," *Black's Law Dictionary* describes the doctrine as: "The right of a tenant to take and carry away, after his tenancy has ended, such annual product of the land as have resulted from his own care and labor. "Emblements" is specifically defined as: "Crops annually produced by labor of tenant."

Although Larry Crossley's 1991 lease expired and was legally terminated, the defendant Larry Crossley claims that by the posting of the $2,000 appeal bond and the dismissal of the forceable entry and detainer action, that the "tenancy of uncertain duration was created with Larry Crossley."

The Court cannot agree. The filing of an appeal bond and/or the dismissal of the foreceable entry and detainer does not create a landlord-tenant relationship between the plaintiff and the defendant Larry Crossley.

When defendant Larry Crossley planted his crop in May of 1992, he did not have a tenant relationship and, as a result, the doctrine of emblements is not applicable in the instant case. See *Hecht v. Dittman*, 7 N.W. 495, 56 Iowa 679; *Everingham v. Brayden*, 12 N.W.2d 142, 58 Iowa 133; *Goldstein v. Munden*, 210 N.W. 444, 202 Iowa 381. The doctrine of emblements pertains to planted crops prior to a termination of tenancy. See 21A Am.Jur.2d, *Crops*, § 25.

The court finds that the defendant Larry Crossley had no right to plant the crop in May of 1992 and therefore has no right under the doctrine of emblements to the proceeds of the crop pursuant to the arguments submitted in defendant's motion.

Defendant's motion is hereby denied. Any costs incurred is assessed to defendant Larry Crossley.

Dated this 12th day of October, 1993.

/s/ Illegible
Judge, Second Judicial District

Copies to counsel of record
and defendant

On same date as above file stamp,
a copy of this document was delivered
or mailed to Cooper/L. Crossley/
D&P Crossley/McGrath/
Illegible
Clerk District Court
above named County, Iowa
By /s/ Illegible

## APPENDIX H

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF IOWA
CENTRAL DIVISION

| | |
|---|---|
| LARRY CROSSLEY,<br><br>Plaintiff,<br><br>v.<br><br>LIBERTY BANK & TRUST CO., f/k/a FOREST CITY BANK & TRUST CO., WINNEBAGO COUNTY BANCORPORATION; JAMES F. WOOLDRIDGE, GLENDA RICHARDSON, LOWELL SOLBERG, W. A. KRAUSE, RICHARD WINKERT, C. WILSON PERSINGER, LOREN LUBBEN, JOHN WITMER, AND JANET WITMER,<br><br>Defendants. | Civil No.<br>C 93-3083<br>ORDER<br><br>(Filed<br>Dec. 22, 1993) |

Defendants Liberty Bank & Trust Co., Winnebago County Bancorporation, James F. Wooldridge, Glenda Richardson, Lowell Solberg, W.A. Krause, C. Wilson Persinger, and Loren Lubben's combined motions to dismiss pursuant to Fed. R. Civ. P. 12(b)(1) and (6) bring this matter before the court. After careful consideration of the parties written and oral arguments the court grants the motion.

## FACTS

This matter concerns a state foreclosure action of real estate purchased by Donald and Patricia Crossley on contract from Frances Ballard in 1973. In 1985 Donald and Patricia Crossley assigned their equitable interest in the property to Liberty Bank & Trust Co., formerly known as Forest City Bank and Trust Co. as security for a loan. In 1986 Frances Ballard assigned his interest in the property as vendor to Larry Crossley. On September 7, 1988, Frances Ballard amended his assignment to Larry Crossley to reflect that Larry Crossley would thereafter be treated as the buyer of the real estate and Frances Ballard the seller. On September 8, 1988 Donald and Patricia Crossley attempted to revoke their assignment for security to the Bank. Donald and Patricia Crossley then executed a quitclaim deed to Ballard on September 20, 1988. On October 20, 1988, the Bank filed a petition for Foreclosure in the Iowa District Court which named Donald and Patricia Crossley and Larry Crossley as Defendants.

Defendants, Donald Crossley and Patricia Crossley asserted counterclaims against the Bank for fraudulent misrepresentation and breach of contract. These defendants also asserted a counterclaim for breach of an implied duty of good faith and fair dealing arising out of a bank/customer relationship. The counterclaims were tried to a jury which found against the defendants. As a result of the jury's verdict, the counterclaims were dismissed by order of Judge Jon Stuart Scoles in the foreclosure action filed on October 24, 1990.

Defendants Donald and Pat Crossley and Larry Crossley filed Notices of Appeal from the Iowa District

Court's Order in November, 1990 to the Iowa Supreme Court. The appeals are pending.

Subsequently, the Iowa District Court entered a decree in foreclosure in favor of the Bank and against the defendants, and ordered that a special execution could issue for the sale of the mortgaged real estate. In its order of May 13, 1991 the Iowa District Court at p.2 stated:

> 2. The plaintiff's equitable mortgage is established as a lien against the real estate above described and is superior and paramount to the interest, liens and claims of the defendants, except to the extent of the vendor's interest in the real estate contract executed on March 23, 1973. The court need not decide in this proceeding whether Frances Ballard or Larry Crossley has legal or equitable title to the property, because that is not in issue in this foreclosure action. The vendor's interest in the property, whomever may later be determined to hold it, is superior to the interest foreclosed upon by the plaintiff.
>
> * * *
>
> 3. . . . The Clerk of Court shall release said real estate contract proceeds to whomever Frances Ballard and Larry Crossley agree shall be the recipient of said funds or upon further order of whatever court, tribunal, or arbitration panel Frances Ballard or Larry Crossley agree upon to determine the issue of legal title. The determination of legal title as between Frances Ballard and Larry Crossley shall in no way affect or delay plaintiff's foreclosure of its equitable mortgage.

On July 23, 1991, Larry Crossley filed this pro se complaint. Plaintiff claims that the defendants have violated his constitutional rights. He claims violations of; 42 U.S.C. Sections 1983, 1985, 1986, Farm Credit Act, Federal Truth in Lending Act and RICO.

## DISCUSSION

Defendants' motion to dismiss contain four separate and distinct parts:

> I. Plaintiff's complaint fails to state a claim upon which relief can be granted and should be dismissed in its entirety.
>
> II. This court lacks subject matter jurisdiction as plaintiff's claims are barred from being relitigated in this court by operation of the Doctrine of Res Judicata/Claim Preclusion.
>
> III. Plaintiff's complaint is so vague, ambiguous, and confusing that defendants cannot frame a response and plaintiff should be ordered to file a more definite statement of his claims and allegations.
>
> IV. Plaintiff's complaint contains redundant, immaterial, impertinent matters which the court should be stricken.

In considering a motion to dismiss under *Rule* 12(b)(6), the court must assume that all facts alleged in the plaintiff's complaint are true, and must liberally construe those allegation [sic]. "A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). Nevertheless,

such motions "can serve a useful purpose in disposing of legal issues with the minimum of time and expense to the interested parties." *Hiland Dairy, Inc. v. Kroger Co.*, 402 F.2d 968, 973 (8th Cir. 1968). To this end, "well-pleaded allegations are taken as admitted but conclusions of law and unreasonable inferences or unwarranted deductions of fact are not admitted." *Id.*

A. Constitutional Violations 42 U.S.C. sections 1983, 1985 and 1986.

1. Section 1983

In *Roudybush v. Zabel*, 813 F.2d 173, 176 (8th Cir. 1987), the court stated:

> Under section 1983, the plaintiff must show that the defendant deprived him of a constitutional right while acting "under color of" state law. In *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982), the Supreme Court held that in a section 1983 case where a private party defendant performs an act ordinarily performed by private parties and it triggers action by state officials, the defendant's actions are committed "under color of" state law if the conduct qualifies as state action under the fourteenth amendment. The issue thus hinges on whether the defendant's conduct allegedly causing the deprivation of a federal right [is] fairly attributable to the State.
>
> This fair attribution test has two components: a state policy and a state actor. The state policy component requires that "the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the State or by a person for

> whom the State is responsible." A state policy may be inferred from either a state statute, or a well-settled custom or practice. The state actor component requires that the defendant "must be a person who may fairly be said to be a state actor. This may be because he is a state official, because he has acted together with or has obtained significant aid from state officials, or because his conduct is otherwise chargeable to the State." (citations omitted)

Plaintiff fails to assert that any of the defendants acted under color of state law or in conjunction with a state actor. The court is unable to conceive of any possible scenario under the situation listed in the facts section above in which to find that any of the defendants were acting under color of state law. Further, private misuse of a statute by a private actor is not sufficient to state a claim under section 1983. *Lugar v. Edmondson Oil Co.*, 457 U.S. 922 (1982). Accordingly, defendants' motion to dismiss for failure to state a claim is granted on plaintiff's 1983 claim.

2. 42 U.S.C. sections 1985 and 1986

To state a claim under 42 U.S.C. section 1985(3), a complaint must allege four elements:

> 1. a conspiracy;
>
> 2. for the purpose of depriving, directly, any person or class of persons of equal protection of the laws, or of equal privileges and immunities under the law;
>
> 3. that the conspirators committed some act in furtherance of the conspiracy; and

> 4. that the plaintiff was either injured in his person or property or was deprived of having and exercising any right or privilege of a citizen of the United States.

*Griffin v. Breckenridge*, 403 U.S. 88, 102-03 (1971).

In order to state a cause of action under 42 U.S.C. section 1985(3) the plaintiff must allege some class-based discriminatory motive on the part of the conspirators. *Massey v. Smith*, 555 F.2d 1355, 1356 (8th Cir. 1977).

Plaintiff's pro se complaint even under liberal construction[1] fails to state a claim under section 1985.

A cause of action under section 1986 is dependent on a valid claim under section 1985. *Sebastian v. United States*, 531 F.2d 900, 904 n.11 (8th Cir. 1976), *cert. denied*, 429 U.S. 856 (1976); *Kaylor v. Fields*, 661 F.2d 1177, 1184 (8th Cir. 1981). Accordingly, plaintiff's claims for relief under 42 U.S.C. section 1985(3) and 1986 are dismissed for failure to state a claim upon which relief can be granted.

B. Claims pursuant to the Farm Credit Act.

The court finds that the Eighth Circuit has made its position clear, no private right of action exists under the Farm Credit Act. A recent opinion in *Euerle Farms et al. v. Farm Credit Services of St. Paul*, 928 F.2d 274, 276 (8th Cir. 1991), *cert. denied*, ___ U.S. ___, 112 S.Ct. 179, 116 L.Ed.2d 141 (1991), is unmistakably clear. The Court stated:

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[1] Pro se complaints are to be liberally construed. *Haines v. Kerner*, 404 U.S. 519 (1972).

> In *Zajac v. Federal Land Bank*, 909 F.2d 1181, 1182-83 (8th Cir. 1990) (en banc), this court held the Act does not create a private cause of action. We now reject the appellants' argument that *Zajac* is limited to § 2202a of the Act. We see no reason to treat individual sections of the Act differently.

The Eighth Circuit Court of Appeals recently reaffirmed this position in *Abbott v. Farm Credit Bank*, 953 F.2d 1097 (8th Cir. 1992). Therefore, plaintiff's claim for relief arising out of alleged violations of the Farm Credit Act are dismissed for failure to state a claim upon which relief can be granted.

C. Claims pursuant to the Federal Truth In Lending Act.

Plaintiff claims that defendants violated the Federal Truth In Lending Act. Setting aside any problems with standing the court finds that plaintiff's claim is barred by the one year statute of limitations found in the Act. 15 U.S.C. section 1640 (e) states:

> Any action under this section may be brought in any United States district court, or in any other court of competent jurisdiction, within one year from the date of the occurrence of the violation.

Plaintiff alleges in his complaint that the defendants violated the Act in the making a loan to Donald and Patricia Crossley in 1985. Therefore, plaintiff's claim for relief arising out of alleged violations of the Federal Truth in Lending Act are dismissed for failure to state a claim upon which relief can be granted.

D. Claims pursuant to "RICO statutes" and 18 U.S.C. sections 241 and 242.

Plaintiff's complaint even under the fullest extent of liberal construction fails to state a claim of violations of the Civil RICO sections of Title 18.

Plaintiff's complaints arising under 18 U.S.C. sections 241 and 242 are criminal in nature. Plaintiff lacks standing to bring an action of any alleged violations of these sections. Therefore, plaintiff's claim for relief arising out of alleged violations of "RICO statutes" and 18 U.S.C. sections 241 and 242 are dismissed for failure to state a claim upon which relief can be granted.

The court having found that each of the claims asserted by the plaintiff should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6) any further discussion of ground raised by defendants in their motion to dismiss is unnecessary.

The Court has considered plaintiff's request for appointment of counsel to aide him the presentation of his case and finds that in consideration of the motions to dismiss counsel would not have been able to effect the above listed findings.

As noted on page 2 of this order the plaintiff has appealed to the Iowa Supreme Court the November, 1990 order of the Iowa District Court. If he were to prevail on the appeal he would probably have the relief he is seeking, however if he does not prevail on said appeal he may refile in this court without paying further filing fees. If such a refiling occurs the rulings in this order will still

apply. The court will, however consider any new claims plaintiff might feel he has.

**THEREFORE IT IS ORDERED** that defendants' motion to dismiss is granted. Having dismissed all of plaintiff claims this action is dismissed in its entirety.

**IT IS FURTHER ORDERED** that if plaintiff fails in his attempt to have the Iowa District Court's Order of November, 1990, overturned, he may refile, without payment of any additional fees, any new and different claims than those previously asserted.

APRIL 6, 1992

/s/ Donald E. O'Brien
DONALD E. O'BRIEN,
CHIEF JUDGE
UNITED STATES
DISTRICT COURT

Copies of Order & Judgment mailed regular on Apr. 6, 1992 to:
Larry Crossley Rt 3 Forest City, IA 50463.
Mark McManigal Jeff Goodman Ann VerDeul 3737 Woodland Ave W. Des Moines, IA 50265.
John & Janet Witmer 2513 Buckness Dr. Valrico, FL 33594.

/s/ Gary L. Illegible Deputy Clerk

(4)

No. 96-1010

Supreme Court, U.S.
FILED
FEB 4 1997
CLERK

In The

Supreme Court of the United States

October Term, 1996

LARRY A. CROSSLEY
Petitioner,

v.

LIBERTY BANK & TRUST CO., THOMAS J. HROMATKA, C.E.O., HERTZ FARM MANAGEMENT INC., GARY LOOS AS RECEIVER, FARMERS CO-OP ASSOCIATION FOREST CITY, FARMERS CO-OP ELEVATOR CO. LELAND, DON SEVERSON, GARY STERLING, RONALD G. PYLE, RONALD PENNING, AND YET TO BE NAMED JOHN DOES,
Respondents.

On Petition For Writ of Certiorari To The United States Court of Appeals for the Eighth Circuit.

# REPLY TO BRIEF IN OPPOSITION

**LARRY A. CROSSLEY**
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10 pp

## QUESTIONS PRESENTED FOR REVIEW

1. Certiorari should be granted to supervise the departure from the accepted and usual course of judicial proceedings.

2. Certiorari should be granted to resolve the conflict among the Eighth Circuit and the State Court relative to the application of Title 42 U.S.C. §1983, 1985(3), 1986, Title 7 U.S.C. §2000 et. seq. and Iowa Code 561, 656, 554, 646, 680, I.R.C.P. 258.

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## I. CERTIORARI SHOULD BE GRANTED TO SUPERVISE THE DEPARTURE FROM THE ACCEPTED AND USUAL COURSE OF JUDICIAL PROCEEDINGS.

Respondent's claim that this court should deny this petition because it is meritless and to the point. The real truth is that the respondents rely heavily on erroneous State Court proceedings. Larry Crossley, petitioner, was denied due process of law and was deprived of his liberty and property rights, which is his homestead and his crops. Larry Crossley showed the Federal District Court that the Bank had waived any right to a deficiency judgment and therefore the homestead was exempt and also the crops. Larry Crossley repeatedly raised these issues in the State Court and argued the Iowa statutes several different times, but the respondents chose to be silent and the Iowa State Courts chose to overlook the Iowa Code Statute 561. The Iowa State Court proceedings are erroneous due to the very simple fact that they are not supported by and are in direct conflict with Iowa Code Statutes 561, 656, 646, 628, 554.9307, 654 and 680. The Bank and Hertz brought a forcible entry and detainer action against all of the Crossleys' to have them evicted from the homestead. The forcible entry and detainer action was dismissed June 16, 1992, this fact was brought to the attention of the Federal District Court, the Iowa State Court along with respondents in this case violated petitioner's due process rights by evicting him without proper notice, without a hearing and with no judgment against Larry Crossley to be dispossessed from his property.

Respondent's cases cited are not on point and contradict the Supreme Court, Justice Rehnquist, held in CELOTEX CORP. v. CATRETT 106 S. Ct. 2548 (1986), (3) nonmoving party need not produce evidence in a form that would be admissible at trial in order to avoid summary judgment. Petitioner made more than a sufficient showing of an essential element, which was the proof that the Bank waived any right to a deficiency judgment in the State Court proceedings. The SUPREME COURT of IOWA will not allow the appointment of a receiver in the case where the deficiency has been waived, see FEDERAL LAND BANK v. FAUGHT BROS. 468 N.W. 2d 793 795 Iowa (1991) "Where the right to a deficiency has been waived there exists no right to appoint a receiver...". Summary judgment should not be granted if a reasonable jury could return a verdict for the nonmoving party. ANDERSON v. LIBERTY LOBBY, INC., 477 U.S. 242, 248, 106 S. Ct. 2505, 2510, 91 L. Ed. 2d 202 (1986) Petitioner believes that a reasonable jury would have no problem, hearing the facts and the truth, that they would return a verdict in the petitioners favor. Petitioner submits that certiorari should be granted because the Federal District Court for the Eighth Circuit's judgment ignored the facts, the issues and the State and Federal Statutes Title 42 §1983, §1985(3), §1986, Title 7 U.S.C. §2000, Iowa Code §561 and acted as a super jury and decided the facts against the petitioner, this was reversible error. Petitioner, Larry Crossley, asks this Honorable Court to grant Certiorari and allow the truth to be told.

**II. CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE EIGHTH CIRCUIT AND THE STATE COURT RELATIVE TO THE APPLICATION OF TITLE 42 U.S.C. §1983, 1985(3), 1986, TITLE 7 U.S.C. §2000 ET. SEQ. AND IOWA CODE 561,656,554,646, 680, I.R.C.P. 258.**

All of the respondents have brought fraud upon this honorable court by the very findings of their pleadings as filed. These are "conclusions" as dismissal of petitioner's complaint was entered without petitioner's issue's being heard so the court based its "conclusion" had to be based either on "political reason" or "moral personal reason" both which are not founded with either the "commands" of the Constitution of the State of Iowa, which is found in a very recent decision by the United States Supreme Court, Justice Kennedy wrote so very clear of the mandates of all Federal courts which were denied to petitioner. See UNITED STATES v. GOOD REAL PROPERTY, 114 S. Ct. 492(1994) where the following statement is made as

> "Certain wrongs affect more than a single right and, accordingly, can implicate more than one of the Constitution's commands. Where such multiple violations are alleged, we are not in the habit of identifying as a preliminary matter the claim's 'dominant' character. Rather, we examine each constitutional provision in turn."

Discovery is a due process right wherein dismissal of Appellant-Crossley's complaint did deprive Crossley of "due process" in civil

matter, CHAPMAN VS. CALIFORNIA, 87 S. CT. 824 (1967) that states:

> "Constitutional rights requires due process.:

See also EX PARTE VIRGINIA, 100 U.S. 339 (1879) Wherein the entire opinion came down to the following:

> "14th Amendment requires "due process" and "equal protection" of property rights.:"

"Due process" is a "peoples right" see HOLDEN vs. HARDY, 18 S. CT. 833 (1898) wherein as seen in HUGHES vs. ROWE, 101 S. CT. 6 (1980) holds:

> "Action without full hearing is a "due process" violation and a civil rights violation as well."

The Federal Court's decision in this case has been in conflict with all the cases cited so far in this petition, the merits of this case have been totally overlooked, in RINALDI vs. YEAGER, 86 S. CT. 1497 (1966) where it states,

> "equal protection is constitutional right where denial of access to the courts is found."

Appellant-Crossley finds support in UNITED STATES vs. GOOD REAL PROPERTY, supra, as it must also be respectfully seen by review of OWEN vs. HAAS, 661 F. 2d 1242 (1979) states:

> Summary judgment reversed as implied power with gross negligence combined with deliberate indifference in local body is a person with proper jurisdiction with right of discovery with failure to state a claim motion reversed as parties have right to amend complaint as there is alleged actual and implied knowledge found is civil rights complaint that

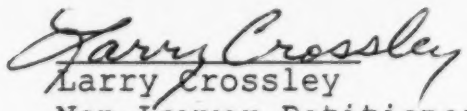
should not be dismissed at pleading stage."

Curiously the Eighth Circuit engaged in no real historical or legislative analysis of §1983, 1985(3), 1986. If it had it would have had to address the cases cited in this petition. No analysis of Crossley's liberty and property rights were addressed by the Federal District Court and undoubtedly not reviewed by the Eighth Circuit Court of Appeals. The respondents do not seem to realize that this is a liberty and property rights, due process case. The respondents have not made any ligitimate defenses for their actions to this very day. Larry Crossley has had to argue and spell out his case as though he was guilty of a crime, why? The real crime in this case is allowing the actions of the respondents to go unquestioned by anyone, why? How many more people are going to be victimized by these respondents and people like them?

## CONCLUSION

This case presents serious due process and liberty and property rights issue's and constitutional rights concerning the statutes invoked in thousands of cases annually in Iowa and other states. Petitioner would like to remind this honorable Supreme Court that two sheriffs deeds were used, three writs of possession were used, the Bank waived any right to a deficiency judgment. A forcible entry and detainer action was brought and dismissed, and petitioner was deprived of his homestead and crops and the last important issue which not one of the respondents will acknowledge is that Larry Crossley holds legal title to the property in this case. Petitioner respectfully requests this honorable Court grant Certiorari to review the issues and allow the truth to be told.

Respectfully submitted,



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